# Brief of Appellants

# United States Court of Appeals

*for the Ninth Circuit*

No. 15293

CEDAR CREEK OIL AND GAS COMPANY, a corporation, INTERNATIONAL TRUST COMPANY, a corporation, H. C. SMITH, SUSAN M. WIGHT and W. B. HANEY,

*Appellant,*

*vs.*

FIDELITY GAS COMPANY, a corporation, MONTANA-DAKOTA UTILITIES COMPANY, a corporation, and SHELL OIL COMPANY, a corporation,

*Appellees.*


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## CASES CITED

## STATUTES AND RULES

## TEXTS

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*Appellees.*

## JURISDICTION

Appellants commenced this action in the District Court of the Sixteenth Judicial District of the State of Montana, in and for the County of Fallon, to quiet the title of the appellants to certain lands and leases situated in Fallon County, Montana. The action was removed to the United States District Court on the grounds of diversity of citizenship of the parties. There is diversity of citizenship and the amount in controversy exceeds $3,000.00 and the District Court and this Court have jurisdiction under Title 28, U. S. C. A., Section 1332.

## STATEMENT OF THE CASE

Appellants are the owners of certain lands and leases along the geological structure known as the Cedar Creek Anticline in Fallon County, Montana. Appellee Montana-Dakota Utilities Company, and the appellants, or their predecessors entered into separate but identical agreements in 1934 and prior thereto for the inclusion of their lands in a certain gas unit for the production of gas from their lands in the horizons above 2,000 feet. Contemporaneous with the execution of the Gas Unit Agreements, the parties entered into Gas Purchase Agreements under which appellants, or their predecessors agreed to sell the gas produced from their lands under the Unit Agreements to defendant Montana-Dakota Utilities Company.

In 1934, separate but identical agreements, herein referred to as the Fidelity Operating Agreements, were made

between the appellants, or their predecessors and appellee Fidelity Gas Company, a wholly owned subsidiary of appellee Montana-Dakota Utilities, under which the horizons below 2,000 feet in the lands here involved were committed by the appellants, or their predecessors for the purpose of exploration and drilling for oil and for the production of oil. No provision for the payment of rentals or or delay rentals in cash was contained in the agreement.

In 1951, an agreement was entered into between the appellees, Montana-Dakota Utilities, Fidelity Gas and Shell Oil Company under which appellees contend these lands, with others, were committed by the first two appellees to an agreement with Shell under which the latter company was to explore and drill for oil and produce oil from the lands.

By the first cause of action, each appellant alleges that appellees claim an interest in their lands and leases by reason of the Fidelity Agreements. By the second cause of action, each appellant alleges that appellees claim some interest in their lands under the Gas Unit Agreements. Appellants allege that the claims of the appellees are invalid, without any right whatsoever, and ask a decree quieting title in the appellants in their respective lands and leases.

By their answers, the appellees claimed possession of the lands under the Fidelity Agreements, the Gas Unit Agreements, the Gas Purchase Agreements, and the agreement

between appellees Montana-Dakota Utilities Company, Fidelity Gas and Shell Oil Company. Appellees also plead estoppel, waiver and laches.

Appellants, after obtaining leave of Court, filed their reply in which the validity of the agreements is denied. The reply alleges first that the Fidelity Agreements were options which have expired by their own terms by reason of the failure of Fidelity Gas Company to drill further wells within a reasonable time, after completion of drilling of three wells prior to December 1, 1937; second, if the agreements did not terminate by their own terms, appellee Fidelity Gas abandoned its rights under the agreements; third, if the agreements did not terminate by their own terms, and if they were not abandoned, Fidelty Gas' rights terminated because it was the duty of the appellee to diligently and within a reasonable time continue exploration for oil in the deeper sands; fourth, that the appellees are estopped to claim under the Fidelity Agreements.

The reply also attacked the validity of the Unit Agreements the Gas Purchase Agreements, but upon the pretrial conference, the validity of these agreements was removed as an issue and appellants' contention with respect to these agreements was limited to the claim they only applied to the horizons known as the Judith River Sands. In this latter contention, the Court found for appellants. (Finding XXIX). (Tr. 198).

As stated by the Trial Court in its memorandum, the principal issue to be determined by the suit is whether the

Fidelity Operating Agreements are still in full force and effect. The Fidelity Operating Agreements are before the Court as Defendants' Exhibit 2. The main contentions of the parties before the Trial Court, and here are; appellants contend the Fidelity Operating Agreements are subleases in the form of option or "unless" leases subject to the usual rules applicable to such oil and gas leases while appellees contend that the agreements are Operating Agreements, not subject to the usual rules applicable to such oil and gas leases and that the agreements could only be terminated by notice of forfeiture.

The Trial Court found that the agreements were, in fact, subleases granting to appellee Fidelity Gas Company the option to keep the subleases alive by drilling in accordance with the terms of the agreement. (Finding of Fact XII, XIV). (Tr. 192). The Court concluded, as a matter of law, that there was not sufficient evidence to determine whether the option had been exercised in accordance with the agreement (Conclusion of Law No. II) (Tr. 200), and in its memorandum determined that further evidence on the question would have to be taken if the case were to turn on this point. (Tr. 176). The judgment was not based on this point, however. The Court determined that appellants were estopped to question the continuing validity of the Fidelity Operating Agreements and held the agreement to be in full force and effect, and that appellants held their lands subject to them. Memorandum

(Tr. 195, 196, 197, 198) (Conclusions IV, V, VI) (Tr. 200).

The lands are located approximately in the center of a narrow geologic structure some 65 or more long known as the Cedar Creek Anticline. Leasing for production started before 1920. Gas wells were drilled in the 20's by John Wight and his group, appellants Cedar Creek and Minnesota Northern Power, a predecessor of appellee Montana-Dakota Utilities. Wight and his associate, by 1925 or 1926 had leases on something like 85,000 acres in the Cedar Creek field. (Tr. 239). A pipeline was built by a predecessor of appellee Montana-Dakota Utilities Company. (Tr. 242). The only market for the gas was through this pipeline. Gas was produced by Minnesota Northern from lands adjacent to those of Wight and others, so Wight and his associates were required to pay compensatory royalties on their federal leases. (Tr. 242). Minnesota Northern or its successor, Gas Development Company, would not take gas from appellants or their predecessors unless they would agree to unitize their lands. (Tr. 243). In about 1931 a move was initiated to unitize the upper or Judith River Sands, finally resulting in the execution of the Unit and Gas Purchase Agreement referred to above. Nine units were established, No. 1 at the north end and No. 8 at the south. The lands and leases of appellants lie in Unit 5.

At about the same time, Montana-Dakota Utilities created its wholly owned subsidiary, Fidelity Gas, as an

oil production company, and the Fidelity Operating Agreements were negotiated with appellants and others in 1934. The record shows that appellants and their predecessors entered into all of these agreements reluctantly and only to save their federal leases. (Tr. 246).

It is undisputed that three wells were drilled by Fidelity Gas pursuant to the Fidelity Operating Agreements by January, 1938, two in Unit 8-B and one on lands of appellant Cedar Creek Oil and Gas in Unit 5. (Tr. 542). The Unit 5 well was a dry hole. There was some production from the Unit 8-B wells through 1938, but none thereafter. Tr. (542). No further drilling was done until Carter Oil Company drilled a well in Unit 8-B, about 35 miles south of the lands of the appellants, commenced in May of 1941 and completed early in January, 1942. No more drilling was done until a well was drilled by Husky Oil and Refining Company under an agreement with Fidelity Gas, commenced on May 13, 1949 and completed July 29, 1949. It is the position of the appelllants that neither of these wells was drilled under the Fidelity Operating Agreements as they applied to appellants' lands.

Both wells were dry, and the next well that was drilled was commenced by Shell Oil Company on July 8, 1951, in the Pine Unit, north of Unit No. 1 and some 25 miles north of the lands of the appellants.

There is testimony as to continuing negotiations between Montana-Dakota Utilities and Fidelity with others seeking to interest them in drilling along the Cedar Creek Anti-

cline, but the Court determined that this was not drilling within the Fidelity Agreements. (Tr. 176).

Shell proceeded with the drilling of wells on the Cedar Creek Anticline after it had entered into its agreement with appellees Fidelity and Montana-Dakota Utilities. At the time the instant suit was filed, 11 wells had been commenced or drilled on the anticline. Of these, eight were in the Pine Unit about 25 miles north and west of Unit 5, and two were in Unit 8-B, approximately 30 miles south and east of Unit 5. The last well, started three weeks before the filing of this suit, was in Unit No. 3, known as the Cabin Creek Unit, approximately 11 miles north and west of the lands involved. (Defendants' Exhibit 60).

The Fidelity Operating Agreements (Defendants' Exhibit 2) upon which the basic claim of interest in the appellee rests is entitled "Operating Agreement." The granting clause recites that the first party "does hereby devise and sublease and sublet" to the second party certain lands and leases. The Court found the agreements to be leases. (Finding No. XIII. (Tr. 192). Section 2 of the agreement provides a method of declaring a forfeiture for failure to perform the lessees obligations under the contract.

Section 4, when read with the rest of the agreement, makes the agreement one in effct an option or "unless" type oil lease. (Finding No. XIV). Memorandum. (Tr. 175). Because of its importance, the section is here set out:

> "4. After completion or abandonment of said test well, second party shall have the right, at its option,

to prosecute such further drilling of wells under like terms and conditions, and at such times as shall be deemed by it to be good oil field practice, having due regard that the drilling operations hereunder are purely exploratory and speculative, and also having due regard to weather and road conditions. In the event that under customary oil field practice in prospecting a wild cat area, second party shall be unable to commence the drilling of a new test well before September first of any year, the commencement of any such well may be deferred, at the option of the second party, until the following first day of April."

There is much evidence in the record that appellees Fidelity Gas and Montana-Dakota Utilities Company abandoned any rights it now claims to have under the Fidelity Operating Agreements. The Trial Court, by its Finding of Fact No. XXII, (Tr. 196) determined there was no abandonment.

The judgment was based on findings that appellees were estopped to question the validity of the Operating Agreements; that appellants had waived their rights to contend the Fidelity Operating Agreements were no longer in force, and that appellants were guilty of laches in asserting their claims. On these points the record shows affirmatively that from 1938 to 1951 there was no communication of any kind from Fidelity or Montana-Dakota Utilities to any of these appellants, indicating that either Fidelity or Montana-Dakota Utilities were claiming any interests in the lands by reason of the Fidelity Operating Agreement. (Tr. 277, 421, 373, 386). The appellants, who were witnesses, all

testified positively that they assumed the agreements had long since terminated. (Tr. 277).

On April 27, 1951, the Montana-Dakota Utilities wrote a letter to the appellants advising them of the agreement between the defendants Montana-Dakota Utilities and Fidelity on the one hand and Shell on the other, and that Shell would proceed with drilling operations within 90 days. Receipt of this letter, appellants testified, was the first information any had had after 1938 that Fidelity and Montana-Dakota Utilities claimed the agreements were still in effect. (Tr. 277, 376, 395, 420).

As will be shown in the discussion of the question of estoppel, appellees knew appellants were contending at all times that the Fidelity Agreement had expired. On July 16, 1951, Appellant H. C. Smith sent by registered mail, a Notice of Cancellation of the Fidelity Agreement. A similar letter was sent to Fidelity and Montana-Dakota Utilities by appellant Cedar Creek on September 12, 1952. (Exhibit 21). (Tr. 420, 433). An agent of defendant Shell discussed with appellants leasing of the lands from appellants. This suit was filed on February 2, 1953. The Trial Court, by its Finding of Fact No. XXII, held that appellants remained silent and made no claim that the Fidelity Agreement had expired or had been terminated from April, 1951, until the filing of this action on February 2, 1953.

The facts in the case and the pleadings will be further stated in the sections of the brief devoted to the particular questions.

## BASIC QUESTIONS PRESENTED

(1) Are appellants estopped by their conduct from claiming the Fidelity Agreements had terminated?

(2) Did appellants waive any right to claim the Fidelity Agreements had terminated?

(3) Were appellants guilty of laches?

(4) Did the appellees exercise the option to drill and thus keep the Fidelity Agreements alive?

(5) Did the Fidelity Agreements terminate by reason of the failure of appellees to diligently pursue drilling after the drilling of the first three wells, completed in 1937?

(6) Did appellees abondon any rights they might have had under the Fidelity Agreements?

(7) Were appellees estopped from claiming the Fidelity Agreements were still in effect?

(8) Were appellees barred by reason of laches from claiming the Fidelity Agreements were still in effect?

## SPECIFICATIONS OF ERROR

(1) The Court erred in its ultimate conclusion that appellees were entitled to judgment and in entering such judgment. See comments as to Specification of Error No. 2.

(2) The Court erred in making its Conclusion of Law No. VII as follows:

"The Fidelity Operating Agreements, Gas Purchase Agreements and Cooperative or Unit Plan of Development, Unit No. 5, Cedar Creek Anticline, all as more fully described in the second defense of defendants' answer to all causes of action alleged in the amended complaint, are valid, subsisting and in full force and effect as between the plaintiffs and these defendants."

By its Finding of Fact No. XIV, the Court found the Fidelity Agreements to be options which would ipso facto terminate upon the failure of the appellees to exercise the option by drilling. The drilling of two wells in a fourteen year period, 25 or 30 miles from the lands involved, was not sufficient drilling to exercise the option. The Fidelity Agreement being an option, it terminated by failure of the appellees to drill in accordance with its terms. The record shows the appellees abandoned any rights under the Fidelity Agreement prior to 1940. If the agreements did not terminate otherwise, they terminated by reason of the violation of the implied covenant to diligently drill and develop.

(3) The Court erred in making its Conclusion of Law No. VIII as follows:

"Plaintiffs, and each of them, hold and own their respective interests as defined in Findings I through VII, inclusive, subject and subordinate to all of the terms and conditions of the instruments described in the second defense of defendants' answer to all causes of action alleged in the amended complaint."

See comment as to Specification of Error above.

(4) The Court erred in making Conclusion of Law No. V as follows:

> "Plaintiffs, and each of them, are estopped from obtaining a judgment and decree of this Court cancelling or forfeiting the Fidelity Operating Agreements to which they have committed their respective interests."

This is not an action for the cancellation or forfeiture of the Fidelity Operating Agreements. The action is one to quiet title and to declare that appellants hold these lands clear of any claim by appellees under the Fidelity Agreements. Appellees failed to prove any of the necessary elements of an estoppel, and the Court erred in finding estoppel as a fact and in making its Conclusion of Law No. V.

(5) The Court erred in making its Finding of Fact No. XXIII that appellants remained silent and made no claim that the Fidelity Operating Agreements had expired or been terminated until the filing of this action on February 2, 1953.

The record shows appellants H. C. Smith and Cedar Creek Oil and Gas Company notified appellees by letter of their claims and that John Wight, during the period, offered these lands for lease to Shell.

(6) The Court erred in making its Finding of Fact No. XXVI that it was not until the value of appellants' interests had been greatly enhanced and the oil producing pos-

sibilities of their property demonstrated by development work and expenditure of appellees that any claim was made by appellants to the appellees that the Fidelity Operating Agreements were no longer in effect.

See comment as to Specification of Error No. 5 above.

(7) The Court erred in making its Finding of Fact No. XXI that the appellee Shell Oil Company, in accomplishing geological and geophysical surveys and in drilling a well, completed in January, 1952, did so in reliance on the validity of the Fidelity Operating Agreements as they affected the lands of these appellants.

This finding finds no support in the record.

(8) The Court erred in making its Finding of Fact No. XXV that all of the development and other activities carried on by the appellees were performed in reliance upon the belief that the Fidelity Operatng Agreements covering appellants' interests were valid, subsisting agreements and in full force and effect.

There is no proof in the record that any of the activities of Shell in development and drilling activities were in reliance on the continuing effectiveness of the Fidelity Agreements as they affected appellants' lands, let alone any showing that would justify the finding that all of these activities were in reliance upon the Fidelity Agreements being in full force and effect insofar as appellants' lands are concerned at the time of these activities by Shell.

(9) The Court erred in making its Finding of Fact No. XXVII that if the relief prayed for by the amended complaint is granted, the future development for the production of oil from the Cedar Creek Anticline as now planned and carried on by appellee Shell will be impaired, and the benefit to be derived by appellees from development of appellants' lands will be lost.

It is true that if appellants prevail, appellee Shell will not be able to drill the lands of the appellants under its agreement with defendants Fidelity and Montana-Dakota Utilities. The record shows no drilling had been done within 12 miles of the appellants' lands. The closest well was a dry hole. The record contains no evidence that there is oil in the lands of the appellants. There is absolutely no proof that Shell's general activities in the Cedar Creek Anticline will be restricted or impaired by judgment for the appellants. At the time of the trial, their activities had been limited to areas many miles remote from the lands of the appellants.

(10) The Court erred in making its Conclusion of Law No. IV that appellants are guilty of laches and barred from obtaining a judgment and decree cancelling or forfeiting Fidelity Operating Agreements.

This suit was commenced 21 months after appellants had any notice appellees were claiming the Fidelity Operating Agreements were still in effect. This is not an unreasonable delay. Appellees knew appellants claimed the agreements

had terminated. There was no proof of reliance by Shell upon the continuing validity of the Fidelity Agreements as they applied to the lands of the appellants. Appellees have not been prejudiced by the delay in filing the suit.

(11) The Court erred in making its Conclusion of Law No. VI that appellants waived any right to obtain judgment and decree cancelling or forfeiting the Fidelity Operating Agreements.

This is not an action for the cancellation or forfeiture of the Fidelity Operating Agreements. The action is one to quiet title and to declare that appellants hold these lands clear of any claim by appellees under the Fidelity Agreements. Appellees failed to prove any of the necessary elements of a waiver, and the Court erred in finding waiver as a fact and in making its Conclusion of Law No. VI.

(12) While the Court correctly held that the Fidelity Operating Agreement was an option, it erred in not finding the option had not been exercised by the Fidelity Gas Company, and, therefore, the Fidelity Operating Agreement had expired many years prior to the commencement of this litigation.

Drilling a well 30 miles south of the lands of the appellants in 1941 and another in 1949 was not timely exercise of the option and was not drilling within the agreement.

(13) The Court erred in not finding that it was the duty of the appellee Fidelity Gas Company to diligently, and

within a reasonable time, continue exploration for oil in the deeper sands.

The only consideration for the Fidelity Operating Agreement was the exploration and drilling for oil and the failure to diligently, and within a reasonable time, continue exploration for oil in the deeper sands, terminated the agreements if the agreement had not terminated under the option provisions.

(14) The Court erred in excluding oral testimony as to the circumstances under which Paragraph 4 of the Fidelity Agreements were negotiated.

The witness John Wight was asked whether there were any discussions of paragraph 4 of the Fidelity Operating Agreement. Then he was asked: "What was the discussion?" (Tr. 254, 290).

The objection was as follows:

> "We object to that as incompetent, irrelevant and immaterial; the agreement subsequent to that discussion was reduced to writing, signed by the parties, and speaks for itself." (Tr. 254).

Later, the question was asked:

> "Q. Mr. Wight, calling your attention again to the circumstances at the time the Operating Agreement or Deep Test Agreement was negotiated with Fidelity Gas, was there any discussion at the time as what would happen in the event there was no success in the test?
>
> A. Sure.

Q. What was the discussion?"

The objection was renewed in the following language:

> "We object, may it please the Court, it is incompetent, irrelevant and immaterial; there is no issue in this case, no pleading to reform this agreement, and that the witness is now attempting to vary the terms of the written instrument by conversations that took place during negotiations, no proper foundation laid."

While the Court correctly held that by Paragraph 4 of the Fidelity Operating Agreements were in effect options, the paragraph is not so clear as to the time in which additional wells were to be drilled as to require the exclusion of the oral testimony.

(15) The Court erred in not finding that Fidelity Gas Company abandoned its rights under the Fidelity Operating Agreements.

While there is conflict in the testimony, the statements of the witnesses, together with the conduct of the appellees Fidelity and Montana-Dakota Utilities with relation to the lands of the appellants, conclusively establishes abandonment.

(16) The Court erred in not holding that appellees were estopped from claiming the Fidelity Agreements were subsisting agreements as to the appellants.

From 1938 to 1951 appellees maintained absolute silence. They lulled appellants into the belief, by their conduct and silence, that appellees were making no claim that the Fidelity Operating Agreements had not terminated. Relying

on this beliefe, appellants did not institute suits to quiet title.

(17) The Court erred in failing to hold that appellants hold their respective interest in the lands involved free and clear of any claims of appellees under the Fidelity Operating Agreements.

(19) The Court erred in not entering judgment quieting the title of appellants' lands against all claims of the appellees except as to such rights as they may have under the Gas Unit Agreements and Gas Purchase Agreements to the Judith River Sands.

## ARGUMENT

For the purpose of the argument, the Specifications of Error need not be individually considered, but may be considered in groups. Because the case was decided on the point of estoppel, those Specifications of Error relating to it will be considered first.

The Specifications of Error with which this section of the brief are concerned, are Specifications of Error No. 1, 2, 3, 4, 5, 6, 7, 8 and 9.

### I

### ESTOPPELS ARE ODIOUS AND FOUND FOR ONLY THE MOST IMPELLING REASONS

A finding of estoppel precludes a determination of the case upon its merits. For that reason Courts find an estoppel only with reluctance and for the most impelling reasons,

and then only where every element is proven clearly, convincingly and satisfactorily. Typical of the attitudes of the Courts is the statement by the Montana Court in *Fiers v. Jacobson, 123 Mont. 242, 250, 11 Pac. (2d) 968:*

> "Estoppels are odious, are not favored, and should be proven clearly, convincingly and satisfactorily.
>
> "The doctrine must be applied with great care and the equity must be strong and the proof clear."

We ask the Court, in considering the question of estoppel, to bear in mind the further rule as stated in *Willard, et al v. Campbell, et al 91 Mont. 493, 504, 11 Pac. 782:*

> "That time is of the essence of the contract so far as an oil and gas lease is concerned, even though it be not so stated therein, and that a forfeiture is favored where the lessee has failed to begin operations within the time required by the lease."

The record in this case discloses that appellants and their predecessors were pioneers in the development of the gas fields on the Cedar Creek Anticline. (Tr. 239). It shows that predecesssors of Montana-Dakota Utilities refused to accept gas produced by appellants and their predecessors unless they would enter into the Unit Agreement, (Defendants' Exhibit 3) and the Gas Purchase Agreement, (Defendants' Exhibit 4); that appellants and their predecessors were being required to make compensatory royalty payments and that to save their lands and leases, appellants and their predecessors were forced to enter into these agreements and the Fidelity Operating Agreement. (Defendants'

Exhibit 2). (Tr. 242, 243). Examination of the terms of the agreements, and particularly the Fidelity Operating Agreement, Section 9, reveals that appellants and their predecessors were indeed in desperate circumstances when they would enter into agreements so unfavorable in their terms to the land and lease holders. By the terms of the Fidelity Operating Agreements, the only consideration running to appellants was exploration, development and production in the optimistic hope that in spite of all the charges provided in Section 9 of the Fidelity Operating Agreements, there might some day be some net profit to the appellants.

Under the Fidelity Operating Agreement, three wells were drilled prior to January 1, 1938. (Tr. 544-545). Regular reports of activities under the Fidelity Operating Agreements were sent by appellee Fidelity Gas to appellants and their predecessors through 1937, (Plaintiffs' Exhibit 12) (Tr. 261), but from that time to April, 1951, when the letter (Exhibit 26) was mailed by appellees, neither Fidelity nor Montana-Dakota, by word or action, indicated in any manner that they claimed the Fidelity Operating Agreements to be in effect as to appellants' lands. (Tr. 277, 373, 386, 421). The testimony that appellants in good faith thought the agreements had terminated immediately after drilling of the three wells prior to January 1, 1938, is clear, convincing and absolutely uncontradicted, and may not be ignored. (Tr. 270, 271, 272, 273, 384, 385, 419, 420, 421).

From January 1, 1938 to July 8, 1951, a period of more than 13 years, neither Fidelity Gas nor Montana-Dakota Utilities did any seismic, exploration or drilling work to the deeper sands anywhere on the entire Cedar Creek Anticline. (Tr. 607). A well was drilled by the Carter Oil Company under an agreement with Fidelity 30 miles south of the lands of the appellants in 1941. It was a dry hole. The Husky Oil Company drilled a well in 1949 close to the Carter well, it also being a dry hole. This was the extent of the drilling or exploration over a period of more than 13 years, and even this drilling, in view of the appellants, had no relation to the Fidelity Agreements as they applied to the lands of the appellants. We believe the testimony as to abandonment is clear and convincing, but even if it is disregarded, we earnestly contend that under a contract like the Fidelity Operating Agreement, the only consideration flowing to the landowners is exploration, drilling and production, and where, as found by the Court, this Fidelity Operating Agreement is clearly an option agreement, this drilling could not possibly be sufficient to keep the Fidelity Operating Agreement alive.

The holding that appellants are estopped results in appellees retaining in effect, a lease made in 1934 without the expenditure of a penny from 1938 to date for exploration, drilling or development and without any drilling or exploration on the lands of the appellants, or within 30 miles of the lands of the appellants from January, 1938 to July 8, 1951, and no drilling within 10 miles of the lands

of the appellants from January 1, 1938 to the date of the trial. Clearly, only the most extraordinary circumstances in the light of this record would justify a determination of estoppel which precludes a determination of the case upon its merits.

With these preliminary observations as to the question of estoppel we turn to a detailed consideration of the record on the point.

## II

## NONE OF THE ELEMENTS OF ESTOPPEL APPEAR IN THIS RECORD

By its Findings Numbered XXI, XXIII, XXIV, XXV, XXVI and XXVII, Record 195, 196, 197, 198, 199, 200, the Trial Court found that the appellees Shell Oil Company, in reliance on the validity and effectiveness of the Fidelity Operating Agreements, (Defendants' Exhibit 2) induced by the silence of the appellants after the receipt by the appellants of the letter dated April 27, 1951, (Plaintiffs' Exhibit 26) expended large sums of money in geophysical and drilling activities on the Cedar Creek Anticline, and by reason of the silence of the appellants, and their failure to make claim that the Fidelity Operating Agreements had expired or been terminated prior to the filing of the action of February 2, 1953, the appellants are estopped from contending the agreement had expired and from securing judgment.

The elements of an estoppel are stated in *93-1301-6, R. C. M. 1947, Subsection 3,* as follows:

"Whenever a party has, by his own declaration, act or ommission intentionaly and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act or ommission, be permitted to falisfy it."

The Montana Supreme Court in *Waddell v. School District No. 2, 74 Mont. 91, 96, 238 Pac. 884,* spelled out in detail the essential elements of an estoppel:

"In general, to constitute an equitable estoppel, the following elements are requisite: (1) The party to be estopped must be possessed of knowledge of the true facts or conditions; (2) He must intend that his statements or conduct shall be acted upon or must so act that the party asserting the estoppel had a right to believe that he so intended; (3) The party on the other side must be ignorant as to the true state of facts; and (4) must rely upon the representation made or conduct of the party to be estopped. An essential element to the creation of an equitable estoppel is that *the person asserting it must show affirmatively* that he was misled to his prejudice by reason of the representations or conduct of another, respecting material matters as to which he had no personal knowledge or means of knowledge, and that he acted in reliance thereon. It involves an element of falsehood or fraud, both of which are abhorred by the law and is applied to protect a person from loss or damage in consequence of reliance placed upon the representations or inducements made by another by acts or words. 'It is elementary before anyone can invoke the doctrine, he must show that he was misled to his prejudice by the conduct of which he complains'." (Emphasis supplied).

The essential elements are more briefly stated in *Gypsy Oil Company v. Marsh, Oklahoma 248 Pac. 329, 48 A. L. R. 876, 886:*

> "The essential elements of an equitable estoppel are: First, there must be a false representation or concealment of facts; second, they must have been made with knowledge, actual or constructive, of the real fact; third, the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; fourth, it must have been made with the intention that it should be acted upon; fifth, the party to whom it was made must have relied on or acted upon it to his prejudice."

A further rule, preliminary to a discussion of the facts in this case on estoppel, is that every essential element must be present before there can be an estoppel. In *Gerard v. Sanner, 110 Mont. 71, 80, 103 Pac. (2d) 314, the Montana* Court said:

> "This court has said, however, that all of the usual elements must be found to exist; otherwise estoppel does not arise. (Lindbloom v. Employers' Liability Assurance Co., 88 Mont. 48, 295 Pac. 1007)."

The author in *31 C. J. S. 256* states the rule thus:

> "There can be no estoppel if any of the requisite elements thereof are wanting. They are each of equal importance."

A further general rule is that the burden of proof is on the one claiming the estoppel to prove the existence of all

of the necessary elements. The Montana Court in *Fiers v. Jacobson, 123 Mont. 242, 252, 11 Pac. (2d) 968, supra,* had this to say:

> "Estoppels are odious, are not favored and should be proven clearly, convincingly and satisfactorily."

In *31 C. J. S. 455,* it is said:

> "Where a party relies upon an estoppel in pais * * * the burden is on such party to prove the essential elements of such an estoppel."

Further, in *31 C. J. S. 457,* the author says:

> "Every fact essential to an estoppel must clearly and satisfactorily proved by the preponderance of the evidence. Where the evidence is evenly balanced, the burden of proof * * * is not sustained.
>
> "Estoppels cannot be based upon mere conjecture; and facts alleged to constitute them will not be taken by argument, inference or intendment."

See also *Waddell v. School District No. 2, supra.*

In *Mackey Wall Plaster Company v. U. S. Gypsum Company, D. C. Montana, 244 Fed. 275, Affirmed 252 Fed. 397, 164 C. C. A. 321,* Judge Borquin stated the rule as follows:

> "He who alleges waiver and estoppel must clearly and satisfactorily prove all the necessary facts and elements. Mindful that defendants' testimony is of two witnesses and plaintiffs of but one, circumstances tend to establish at least equipoise between them, and so defendant has not sustained the burden of proof imposed upon it by its defense."

With these general observations as to the rules applicable, let us examine the record to see whether the appellees, or either of them, have sustained the burden of proving clearly and convincingly all of the essential elements of an estoppel.

Obviously, none of the elements of estoppel exist insofar as the appellees Fidelity Gas and Montana-Dakota Utilities Company are concerned, and that clearly is the conclusion of the Court.

All of the Court's references in its findings, its memorandum and in its conclusions relate solely to Shell. By its memorandum, (Tr. 179) the Court said that it was Shell who, in reliance upon the validity of the agreements, undertook expensive drilling operations and that it was Shell that was planning to expend money for drilling in reliance on the validity of the Fidelity Agreement. (Tr. 180). By Findings No. XXI, XXIII, XXV and XXVII, the Court makes it absolutely clear that it is only as to Shell that the Court found the existence of the estoppel and no other conclusion could be reached. The record shows that neither Fidelity nor Montana-Dakota Utilities expended one cent for oil exploration or development after 1938. (Tr. 607). Neither one prejudiced its position in any way by entering into the agreement with Shell. (Appellees' Ex. 5). These two appellees knew all the facts known to appellants. The agreement was drawn by them. (Tr. 583). As between appellants and appellees, Fidelity Gas and Montana-Dakota Utilities there could be no estoppel.

DID SHELL PROVE AFFIRMATIVELY THAT IT ENTERED INTO ITS AGREEMENT WITH FIDELITY AND MONTANA-DAKOTA UTILTIES IN RELIANCE ON A BELIEF THAT THE FIDELITY OPERATING AGREEMENTS WERE IN EFFECT AS TO APPELLANTS' LANDS?

The first essential of estoppel is reliance by the one claiming the estoppel on the action or non-action of the one sought to be estopped. There is no direct testimony in the record that Shell would not have made its agreement wth Montana-Dakota Utilities and Fidelity, or that it would not have gone ahead with the drilling on the Cedar Creek Anticline, all of which at the time of the filing of the suit was at a distance of more than 25 miles to the north and 35 miles to the south of the lands here involved if, in fact, the Fidelity Operating Agreements had expired as to the lands here involved. There is pleading of reliance by Shell, and there is much by way of argument of counsel as to reliance by Shell, but the record is barren of any testimony that Shell would not have made the agreement with Fidelity and Montana-Dakota Utilities or drilled the wells it had drilled except for its reliance upon the validity of the Fidelity Agreements insofar as these appellants are concerned.

The only representatives of Shell called as witnesses were T. R. Barnes, its geologist, (Tr. 659) and E. G. Christianson, one of its engineers, (Tr. 689) neither of whom apparently participated in any way in making the agreement between Shell and the co-appellees. Barnes was called as

an expert on the geological formation and to testify as to wells drilled and to certain costs. Christianson was called to testify as to the number of wells drilled, as to the production and as to costs.

Failure to call a witness who participated in the negotiations on behalf of Shell raises the presumption that the testimony, if produced, would not support the appellees' case.

As to parties who fail to testify to facts material to their case, the rule is stated in *31 C. J. S. 860,* as follows:

> ". . . as a general rule, the non-appearance of a litigant at the trial, or his refusal or failure to testify as to facts material to his case, and peculiarly within his knowledge, creates an inference that he refrained from appearing or testifying because the truth if made to appear would not aid his contention."

The same rules applies to witnesses, as stated in *31 C. J. S. 853:*

> "The unexplained failure of a party to call or examine an available witness who possessed peculiar knowledge may give rise to an inference that the testimony of such witness would not sustain the contention of the party."

These appellees are not indigent. They are represented, as the record will show, by extremely able counsel. The stakes in this suit are high. No explanation was given of the failure of the appellees to call officers of the defendant Shell who negotiated the agreement. The only logical in-

ference to be drawn is that the witnesses, if called, would have to testify that there was no reliance by Shell when it made the agreement, (Appellees' Ex. 5) upon the continued effectiveness of the Fidelity Operating Agreements to the lands here involved.

The entire direct testimony on the question of reliance on the validity of the Fidelity Operating Agreement is set forth in Transcript 681, 682, where the witness Barnes was asked this question:

> "Q. When your company went into the Cedar Creek Anticline on its seismic work, was it of value that all of the lands, or a large portion of the lands were blocked up under the Fidelity Operating and other agreements?"

and in reply said:

> "A. In our exploration program, we must acquire lands prior to very expensive exploration such as our seismic efforts, so that when we find what we call a drillable location, we have control of those lands, and if we have to pick them up 40 acres by 40 acres, a greater time is consumed than if we are able to acquire them as we did in these unit agreements, many thousands of acres. Our program was able to expand very rapidly and cover the area."

This is all there is. Barnes said it was of value to control lots of land. He said time could be saved by acquiring lots of land under one agreement. This is a far cry from carrying the burden of proving that if Shell had not relied

on the validity of the Fidelity Operating Agreements it would not have embarked on its highly successful drilling program on the Cedar Creek Anticline.

Nor is there anything about the record which supplies the absence of this testimony. The Shell-Fidelity-Montana-Dakota Agreement (Defendants' Ex. 5), relates primarily to Units 8-A and 8-B of the Cedar Creek Anticline, an area extending from 20 to 35 miles southeasterly from the lands of the appellants. As in the case of the prior agreements with Carter and Husky (Defendants' Ex. 43, 44, 45), (Tr. 610, 612), the principal interest of Shell was in that area. The trial of this cause was held on April 14, 15 and 16, 1955, four years and four days after the signing of the Shell-Fidelity-Montana-Dakota Agreement and Shell had not drilled one well in the township in which these lands are situated. (Tr. 180). To the north, approximately 10 miles from the lands involved, a well was drilled in Section Four (4), Township Nine (9) North, Range Fifty-Eight (58) East, which was completed on July 1, 1954. (Defendants' Ex. 60). To the south, the closest drilling, a dry hole, was in Section Twenty-Two (22), Township Six (6) North, Range Sixty (60) East, about 14 miles south of these lands. (Defendants' Ex. 60). Of the eleven wells drilled or started prior to the filing of this action, February 2, 1953, eight were in the Pine Unit which is at least 25 miles north of any lands with which we are here concerned, and the other three in Township Four (4) North, Range Sixty-One (61) East, about 30 miles south of the

lands involved. Certainly at the time Shell embarked on its drilling program, little thought was given to appellants' lands.

A finding of reliance, we submit, rests on "mere conjecture and argument" contrary to the rule as epitomized in the quotation from *31 C. J. S. 457, supra.*

Among the findings upon which the Court relies for its conclusion that appellants relied upon the belief of continuing validity of the Fidelity Agreement and are estopped are Finding No. XXV, (Tr. 197) that all of the development and other activities carried on by the appellees were performed in reliance on the fact that the Fidelity Operating Agreements covering appellants' interests were valid, subsisting and in full force and effect; and Finding No. XXVII, (Tr. 198) to the effect that the future development of the production of oil from the Cedar Creek Anticline by appellee Shell would be impaired and the benefit to be derived by the appellees from the development of appellants' land will be lost.

Further the Court found that Shell had spent approximately $12,000,000 on geological surveys and in drilling (Finding No. XXI), that all of Shell's activities were in reliance on the validity of the Fidelity Agreements as they affected appellants' lands (Finding No. XXV), and that if the Fidelity Agreements have expired as to appellants' lands Shell's program on the Anticline will be impaired and the benefits to be derived by Shell from the development of appellants' lands will be lost.

First, these findings are not justified because the total acreage of the appellants, approximately 4,500, is small compared to the total area covered by the agreement between Shell on the one hand and Fidelity and Montana-Dakota on the other. This case is entirely dissimilar from most estoppel cases in the oil and gas field where the drilling and development work which the owner permits to go on without a claim of title is on the very lands themselves. Under *Bowes v. Republic Oil Company,* 78 Mont. 134, 143, 252 Pac. 800, to be described later, unless the development and drilling work is on the lands of the owners, there can be no estoppel. Be that as it may, the record shows that the Shell-Fidelity-Montana Dakota Utilities Agreements cover all of the lands in which Fidelity and MDU have an interest under the Fidelity Operating Agreements, its leases from the Northern Pacific Railway Company, its fee lands, its federal leases, the state leases, and its leases from individuals. The Northern Pacific Railway owns overy other section in all of the units except Unit 5, where it owns only a few tracts, (Tr. 522, 575, 605) and all of these lands are committed to the Shell-Fidelity-MDU Agreement. (Defendants' Ex. 5). The Shell-Fidelity-MDU Agreement (Ex. 5) purports to cover all of the lands, or practically all, in all nine units. In addition, the agreement covers lands at least in the Pine Unit which was not within the unitized area of the Cedar Creek Anticline. While no witness testified as to the exact acreage involved, examination of the map (Ex. 1-A) which was considered by the

Court by stipulation upon the pre-trial conference, together with the testimony of the witnesses, shows the total acreage covered by the Fidelity Operating Agreements, in these nine units alone would exceed an absolute minimum of 120,000 acres. The lands of the appellants could not exceed 3% of the total area covered by the Shell-Fidelity-MDU Agreements, and that 3% is in Unit 5 that had been condemned in the words of the Vice-President of MDU, Cecil Smith by the drilling of the Warren well in 1937. (Tr. 610).

The witness Smith testified that he did not insist on the inclusion of Unit 5 in his original deals with Carter and Husky because of the adverse results of the Warren well drilled in that unit he felt that insistence on inclusion of Unit 5 would make it more difficult to make a deal with Husky and Carter. (Tr. 610, 611, 612). He also concluded that as the result of the drilling of the two wells by Fidelity and the two wells by Carter and Husky in Units 8-A and 8-B, prospects for production there were good and it is, of course, there and in the Pine Unit that Shell has concentrated its drilling.

The relatively small acreage of the appellants, coupled with the concentration of activities in areas remote from the lands of the appellants, results in no other conclusion than that the Court's findings that all of the development and other activities of Shell were performed in reliance on the belief on the part of Shell that the Fidelity Operating

Agreements were valid and subsisting as they related to appellants' lands cannot be sustained.

What is said above has equal application to Finding No. XXVII that future development for the production of oil on the Cedar Creek Anticline by appellee Shell will be impaired. No one testified that the filing of the suit had slowed down Shell at all, and Defendants' Exhibit No. 2 shows the carrying on of a very aggressive drilling program.

There is not a word to show impairment of the whole program. The most that can be concluded is that if drilling in Unit 5, which had not occurred at the time of the trial, should prove that the lands of the appellants bear oil, Shell would lose the right to take production from those lands.

Further, there is substantial question whether findings that Shell made expenditures, like Finding No. XXIII (Tr. 126) and Finding XXVI (Tr. 126) are justified. In the case of an ordinary oil and gas lease, the lessee takes all the risk. He puts up all the money for exploration, drilling and production. This is not the case under the Fidelity Operating Agreements. These agreements, while leases, are entirely unlike an ordinary oil lease insofar as the payment of costs of exploration and drilling and the division of income are concerned. Under these agreements, and particularly Section 9, see Appendix below, all of the expenditures of every nature made by Shell for exploration, drilling, development, production and including provision for working capital, interest, overhead, operating costs and

every other conceivable item of expense are to be paid from production, and this is to be paid before appellants can get anything. Moneys paid by Shell are, in fact, advances, and not expenditures in the ordinary sense. Shell's drilling program has been most successful. Of 44 wells completed at the time of the trial, only seven were failures. The rest are very substantial producers (Defendants' Ex. 60). Even if the other elements of estoppel do

**Appendix 1**

9. Subject to said right to be first reimbursed for all expenditures, outlays and any obligation made or incurred by it in carrying on all exploration, drilling, production and other operations hereunder, second party shall furnish the necessary working capital and/or provide for all labor, machinery, apparatus, equipment, materials and supplies; all tools, casing, pipe, tubing, and fittings; services and facilities necessary to properly carry on said exploration, development and production operations; and for managing and operating the lands, leases, wells, personal property and all production in connection with the field insofar as the lands herein described are concerned. Except as herein otherwise expressly provided, second party shall be entitled to be first reimbursed for all expenditures, outlays and obligations incurred in said operations out of the first proceeds received from the sale of oil and/or gas and other hydrocarbons produced by said operations, and without limiting the generality of the foregoing, said expenditures, outlays and obligations for which second party shall be reimbursed out of the gross proceeds of the production resulting from its operations hereunder, shall specifically include the following items: FIELD EXPENDITURES: Cost of all services in the field, including field superintendence, field accounting and reasonably necessary geological work; cost of construction, drilling, transportation, maintenance, repairing and dismantling; cost of treating, transporting and manufacturing, production and equipment; cost of all tools, machinery, apparatus, pipe, casing, tubing, fittings, materials, supplies and equipment of all kinds, rentals for tools and equipment, cost of housing and boarding employees when necessary; GENERAL EXPENDITURES: Taxes, assessments, royalties, rentals, insurance of all kinds, including workmen's compensation insurance, bond premium, license, permit and franchise fees, cost of maintaining, enforcing, perfecting, defending and protecting any title, right or interest in any lease or any land included within any lease, or the property used in said operations; including abstracter's and attorney's fees; any sum paid to satsfy, compromise, or settle any claim, demand and actions at law, or in equity, and the cost of prosecuting, defending and adjudicating same; such "general expenditures" except taxes, assessments and insurance of all kinds, shall be charged to the owner of the lease, land or interest thereby involved and deducted from any proceeds accruing to such owner hereunder. INTEREST: Interest at the current rate on the average balance for each month computed monthly for all monies advanced or invested by or otherwise becoming due to second party hereunder, for which second party is entitled to be reimbursed. OVERHEAD EXPENDITURES: A fixed charge of Six per cent (6%) of the total amount of all expenditures and outlays made for all purposes hereunder during each calendar month.

exist, which they do not, this record fails to show that Shell took any action to its prejudice in embarking on the program under the Fidelity Operating Agreement.

Even if moneys expended by Shell were expenditures and not mere advances, there is no showing they are tied in in any way with the lands of the appellees. The Court found the expenditure of approximately $12,000,000 by Shell under the Fidelity Operating Agreement, (Finding XXI) (Tr. 195). Defendants' Exhibit 60 shows that of this $12,000,000, $11,914,676 was spent for drilling wells, all far distant of the lands of the appellants, and most of them development wells.

The witness Barnes did testify as to expenses for seismic work, estimated at $725,000 on the Anticline prior to the filing of the suit, but he does not say that any of it was on appellants' lands or even in Unit 5. If money had been spent on the lands of the appellants, or in Unit 5, it must be assumed able counsel would have developed that fact. Certainly the burden of proof was upon the appellees.

As will be pointed out below because of the knowledge possessed by Shell of appellants' claim, that element of lack of knowledge is lacking from the proof of reliance.

Since reliance by Shell is not proven, there can be no estoppel. *Gerard v. Sanner, 110 Mont. 71, 80, 103 Pac. (2d) 314; 31 C. J. S. 256.*

DID SHELL AFFIRMATIVELY PROVE THAT IT HAD NO KNOWLEDGE OF THE CLAIM OF THE APPELLANTS THAT THE FIDELITY OPERATING AGREEMENTS HAD TERMINATED? DID SHELL AFFIRMATIVELY PROVE THAT THE MEANS OF KNOWLEDGE OF THE EXISTENCE OF THESE CLAIMS WERE NOT AT HAND? DID SHELL PROVE AFFIRMATIVELY THAT IT DILIGENTLY SOUGHT TO LEARN WHETHER SUCH CLAIM EXISTED?

In addition to proof of reliance upon false representation or concealment of the facts made by appellants, there must be proof that Shell was without knowledge or means of knowledge of the claim of the appellants that the Fidelity Operating Agreements were no longer effective. *Gypsy Oil Company v. Marsh, Oklahoma 248 Pac. 329, 48 A. L. R. 876, 886, supra.*

As a part of this basic element of estoppel, there must be proof also by Shell that it used reasonable diligence to learn the truth, this being especially true where, as here, Shell was put on inquiry to determine the truth. *Thorpe v. Lemire, 264 Wis. 220, 58 N. W. (2d) 641, 44 A. L. R. (2d) 189, 195.* This rule of the Thorpe case being stated in *31 C. J. S. 270, as follows:*

> "One relying on an estoppel must have exercised such reasonable diligence to acquire knowledge of the real facts as the circumstances of the case require. *If he conducts himself with a careless indifference to the means of information reasonably at hand or ignores highly suspicious circumstances, which should warn him of danger or loss, he cannot invoke the doctrine of estoppel.*" (Emphasis supplied).

A particularly pertinent observation was made by the Montana Supreme Court in the case of *Waddell v. School District No. 2, 74 Mont. 91, 96, 238 Pac. 884, supra:*

> "A duty rested upon the school trustees in dealing with the landowner to ascertain the true condition of the title of the land before erecting the school building thereon * * *."

There is in this record much evidence that Shell had actual knowledge of the claim of these appellants before it made its agreement with Fidelity and Montana-Dakota, and that at the least it had that knowledge within a very short time thereafter. The testimony of the witness Wight that a notice of cancellaion (Plaintiffs' Ex. 15) was sent by plaintiff Susan Wight some time in 1950 was not contradicted. (Tr. 283).

The witness Wight testified that a land agent of Shell, one Gadbois called on him regarding the lands here involved, and that he, Wight, offered these lands to Gadbois for lease to Shell. (Tr. 275, 276, 196, 297, 304). Wight was not definite as to the exact time Gadbois first called on him, but it was in 1951, or early 1952. There is no question but that the conversation between Wight and Gadbois took place at least several months prior to July 1, 1952. (Tr. 306). The evidence indicates that the first Gadbois visit was probably before the Shell-Fidelity-Montana Dakota Utilities Agreement was made. (Defendants' Ex. 5). Gadbois was not called as a witness by the appellees. No claim was made of surprise or that Gadbois was un-

available. Since the burden is on the appellees to establish the estoppel, the inference is that if the witness Gadbois had been called, he would have corroborated the testimony of the witness Wight, and Gadbois' testimony would have established that at the time Shell was negotiating with Fidelity and Montana-Dakota Utilities, or at least before it incurred any substantial expenditure in the drilling of wells anywhere on the Anticline, it knew that appellants claimed that the Fidelity Agreement was no longer in effect.

The general rule as to the inference to be drawn by reason of the afilure of Shell to call its agent, Gadbois, is stated in *McCormick on Evidence, 534:*

> "It is generally agreed that when a potential witness is available and appears to have special information relative to the case, so that his testimony would not merely be cumulative, and where his relationship with one of the parties is such that the witness would ordinarily be expected to favor him, then if such party does not produce his testimony the inference arises that it would have been unfavorable."

See also *31 C. J. S. 853:*

The testimony of the witness Wight stands uncontradicted. It clearly establishes that Shell knew, long prior to the institution of this suit on February 2, 1953, of the claim of these appellants. This testimony refutes any suggestion of concealment on the part of the appellants of the fact of the existence of their claim, with the intent to lull Shell into a belief that the Fidelity Operating Agree-

ments were considered to be valid and binding by these appellants, as will be set out more fully later.

There is no doubt that the appellees knew directly that the appellant H. C. Smith was claiming that the Fidelity Operating Agreement had expired insofar as his lands were concerned when they received his letter of July 16, 1951, (Plaintiffs' Ex. 50) that letter being dated eight days after the commencement of the first well by Shell some 20 miles north of the lands in question. (Defendants' Ex. 60). It is difficult to reconcile on the one hand the conclusion of the Court that silence estopped the appellants from asserting the invalidity of the Fidelity Agreement, and at the same time, ruling against Smith who did speak out on the theory that his assertion that the agreement no longer was in effect, was a recognition on his part that the Fidelity Operating Agreement was effective, but be that as it may, by that letter, appellees had actual knowledge that at least Smith claimed the agreement was no longer in force. This letter of Smith's was offered by the appellants, including Shell. It knew of it at the time it was received. The Court overlooked completely the notice sent by appellant Cedar Creek on September 12, 1952. (Plaintiffs' Exhibit 21). (Tr. 420, 433). This letter was direct notice of Cedar Creek's claim.

The testimony of the witness Wight as to his conversations with Gadbois, and the letters of H. C. Smith and Cedar Creek, cannot be disregarded, but if they could be, still the appellees would have failed to discharge their

obligation to ascertain the facts. Here we have an oil lease made in 1934, 17 years before the execution of the Shell-Fidelity-MDU Agreement. The lease is not producing. The testimony of the witness Barnes shows clearly that Shell had full knowledge of the date of the drilling of the three wells in 1937. It knew, as it established by its testimony of the drilling of the Carter well which was completed in January of 1942. It knew of the drilling of the Husky well, completed in May of 1950. It knew this was the extent of any drilling purporting to have been done under the Fidelity Operating Agreement.

The Fidelity Operating Agreements (Defendant Ex. 2) were made a part of Shell's Agreement with Montana-Dakota Utilities and Fidelity. (Defendants' Ex. 5). In its Finding No. XIV, (Tr. 192) the Trial Court found the Fidelity Operating Agreements, (Defendants' Ex. 2) to be option agreements. In its memorandum, the Trial Court discussed at length Paragraph IV (the option clause) of the Fidelity Agreement, (Tr. 171, 172, 173, 174), and concluded that:

> "Paragraph IV is not ambiguous, needs no explanation by way of oral evidence, and that such evidence is properly excluded."

And further that:

> "The meaning of paragraph IV is clear when read in the light of the provisions of the contract as a whole."

The Court is emphatic in its conclusion that the Fidelity Operating Agreements were only options to conduct further drilling, and unless that drilling was carried out, in accordance with the agreements, the agreements expired by their own terms. Shell's attorneys were put on notice immediately after they read the Fidelity Operating Agreement (Defendants' Ex. 2) that it was a mere option which expired without any action by appellants if the option were not exercised.

Shell, as is the case of the whole industry, has as its Bible, Summers Oil and Gas. It knew, as is said in that excellent work in Volume 2 at page 497, that in an unless lease, "failure of a lessee to drill or pay . . . ipso facto, terminates the lease without the necessity of re-entry, action or other equivalents by the lessor."

See also, as a leading Montana case on the point, *Bowes v. Republic Oil Company, 78 Mont. 134, 143, 252 Pac. 800,* where it is said:

> "It falls, then, within the category of the 'unless' form of lease, which terminates ipso facto on failure to exercise the option granted and under which no affirmative action is required of the lessor. It is therefore immaterial that the lessor took no action to declare a forfeiture before bringing his action, as the lease automatically expired long prior to the commencement of the action. (Solberg v. Sunburst Oil & Gas Co., 76 Mont. 254, 246 Pac. 168)."

Shell knew that no notice by appellants, nor action to cancel was necessary to terminate the lease if there was not an exercise of the option. *2 Summers Oil and Gas, 501.*

It must be presumed that Shell Oil Company, one of the largest exploration, drilling and producing companies in the world, would also be familiar with the general rule as stated in *Williard, et al v. Campbell, et al, 91 Mont. 493, 504, 11 Pac. (2d) 782 (supra):*

> "That time is of the essence of the contract so far as an oil and gas lease is concerned, even though it be not so stated therein, and that a forfeiture is favored where the lessee has failed to begin operations within the time required by the lease."

This is the universal rule in every jurisdiction.

Here we have an appellee with unequaled experience in the field of leasing and contracting lands for oil exploration, with a large, competent, highly trained staff of attorneys; it had the Fidelity Operating Agreement before it when it made its deal with Fidelity and MDU; the language of the Fidelity Operating Agreement put Shell on notice to inquire into the status of the agreement; it knew that no wells had been drilled under the agreement on the lands of these plaintiffs after 1937; it knew that no wells had been drilled within 25 miles of these lands by Montana-Dakota Utilities or Fidelity, or anyone on their behalf after 1937. Without regard to whether the Trial Court was correct in its conclusion that the evidence was not sufficient to show whether there had been drilling within the requirement of good field practice, (Conclusion of Law No. II) (Tr. 200), the circumstances as to drilling certainly would put any person who knew anything at all about the law of oil and gas on inquiry.

What is said in *31 C. J. S. 270* is controlling:

> "One relying on an estoppel must have exercised such reasonable diligence to acquire knowledge of the real facts as the circumstances of the case require. *If he conducts himself with a careless indiffereice to means of information reasonably at hand, or ignores highly suspicious circumstances which should warn him of danger or loss,* he cannot invoke the doctrine of estoppel." (Emphasis supplied).

The appellants were available. A simple inquiry would have sufficed to apprise Shell of the existence of their claim that the agreements had expired. Its failure to make the inquiry leads to the conclusion that it did not rely on the continued validity of the Fidelity Operating Agreements when it entered into its enterprise, or that it knew had the inquiry been made that plaintiffs would have asserted their claim that the Fidelity Operating Agreements had expired. The second indispensable element of estoppel, lack of knowledge or of means of knowledge of the fact, and diligence in seeking to acquire knowledge is completely absent from the record. Thus, defendants have failed to establish the second required element of an estoppel.

DID THE CONDUCT OF THE APPELLANTS, AFTER RECEIPT OF THE LETTER OF APRIL 27, 1951, IN WHICH MONTANA-DAKOTA UTILITIES INFORMED APPELLANTS OF ITS AGREEMENT WITH MONTANA-DAKOTA UTILTIES SHOW A DELIBERATE INTENTION ON THE PART OF THE APPELLANTS THAT

SHELL SHOULD ACT UPON THE BELIEF THAT SO FAR AS THE APPELLANTS WERE CONCERNED, THE FIDELITY OPERATING AGREEMENTS WERE IN EFFECT AND THAT SUCH CONDUCT WAS FOR THE PURPOSE OF INDUCING SHELL TO ENTER INTO ITS DRILLING PROGRAM ON THE CEDAR CREEK ANTICLINE?

While it is true that mere silence under certain circumstances is sufficient to establish the requisite deliberate intent to influence the conduct of another to act to the other's prejudice, in this record there is proof uncontradicted, negativing any such intention on the part of these appellants. We call the Court's attention again to the testimony as to the conversation between Wight and Gadbois, (Tr. 275, 276, 296, 297, 304), and the letters of H. C. Smith of July 16, 1951, (Tr. 179) and Cedar Creek on September 12, 1952 (Plaintiffs' Ex. 21).

In view of the record, there could be no finding of a deliberate intention on the part of these appellants by their silence to induce Shell to initiate a drilling and exploration program. If that were their purpose, Wight certainly would not have told Gadbois Wight could lease the lands and Smith and Cedar Creek would obviously not have written the letters. Under *Section 93-1301-6, R. C. M., 1947* and all the authorities, appellees had the burden of proving appellants set out intentionally and deliberately to deceive the appellees. This burden was not and could not be discharged.

WHAT WOULD HAVE BEEN THE EFFECT OF A CLAIM BY APPELLANTS THAT THE FIDELITY OPERATING AGREEMENTS HAD TERMINATED IF MADE IMMEDIATELY UPON RECEIPT OF THE LETTER OF APRIL 27, 1951?

At the time of the letter of April 27, 1951, the Shell-Fidelity-MDU Agreement (Defendants' Ex. 5) was an accomplished fact. Shell had assumed obligations from which it could not have released itself no matter what action appellants took. The conduct upon which the estoppel was based happened after, not before, the Shell-Fidelity-MDU Agreement was executed. There is no showing in the record by the appellees, who bore the burden of proof, that immediate formal notice by appellants of their claims upon receipt of the letter of April 27, 1951, would have resulted in any change by Shell in its conduct of its exploration and drilling program. Could anyone suppose Shell's program would have ground to a halt if appellants, on receipt of the letter of April 27, 1957, (Plaintiffs' Ex. 26) had written Shell of their claim that the Fidelity Agreements had terminated? Could Shell, in view of its committments under its agreement with Fidelity and Montana-Dakota Utilities have changed its program in any way had it received formal notice of a claim in May of 1951? The questions answer themselves.

As has been pointed out at the time of the trial, no wells had been drilled on appellants' lands nor within 12 miles of them. There was no activity anywhere, even in the

vicinity of Unit 5, at the time of the trial. What could appellants have done by notice or suit? What duty was there on appellants to do anything until Shell sought to trespass on their lands?

What is said by the Montana Court in a situation analagous to the present one would seem controlling. In *Bowes v. Republic Oil Company, 78 Mont. 134, 252 Pac. 800,* the lessee held several leases on a geologic structure. The lease on appellants' lands—an "unless" lease—had expired by failure of the lessee to drill. Lessee drilled under other leases in the immediate vicinity of lessors' lands and lessee claimed waiver and estoppel by reason of lessor's silence.

Because of the aptness of the language and its striking application to the facts here, we set the applicable portion of the opinion out in full:

> "Defendant contends, however, that plaintiff waived the forfeiture by his conduct in permitting the defendant to drill a second and third test well on the structure after the first default, and at great expense to the lessee, he having full knowledge of what was being done. As to knowledge on the part of the plaintiff, there is a substantial conflict in the evidence, as above noted, and if this question wkere determinative, we would not disturb the court's implied finding against the contention of the defendant. However, it must be remembered that none of the operations of the lessee or its successors were conducted upon the lands of the plaintiff. How, then, could plaintiff have

prevented the lessee from proceeding had he desired to do so? Without passing upon the contention of plaintiff that the defendant is seeking to invoke an estoppel, not pleaded, rather than the waiver pleaded, there was no obligation resting upon the plaintiff to object to operations not upon his land, and his failure to do so constituted neither a waiver of the forfeiture nor an estoppel to assert it. (Solberg v. Sunburst Oil & Gas Co., 76 Mont. 254, 246 Pac. 168)."

The appellees have failed to prove reliance, lack of knowledge of the facts or of means of securing the knowledge by reasonable diligence, and intent of appellants to lull appellees into a belief the Fidelity Operating Agreements were still alive.

The appellees have failed to prove any single one of the essential elements of estoppel, much less the existence of all of the essential elements of an estoppel. Having failed to prove the existence of all of the usual elements, no estoppel arises.

We submit Findings of Fact numbered XXI, XIII, XV, XVI, XVII and conclusions numbered V, VII, VIII and IX are clearly erroneous under Rule 52, Federal Rules of Procedure.

III

THERE WAS NO WAIVER BY APPELLANTS OF THE RIGHT TO CLAIM THE FIDELITY OPERATING AGREEMENTS HAD TERMINATED.

By Specification of Error No II, appellants urge the Court erred in making its Conclusion of Law No. VI, that conclusion being:

> "Plaintiffs, and each of them, have waived any right to obtain a judgment and decree of this court cancelling or forfeiting the Fidelity Operating Agreements to which they have conveyed their respective interests."

There are no findings of fact specifically relating directly to this point, nor is there any discussion of waiver in the memorandum. It must be assumed that the Court, in reaching its Conclusion No. VI founded the conclusion upon the same findings of fact upon which it founded its conclusion of estoppel. We will not repeat in this section of the brief a discussion of those findings as they are covered by the discussion of estoppel, and that discussion has equal application so far as the findings of fact are concerned to the conclusion there was waiver.

As will be pointed out in the authorities, a greater burden is placed upon one claiming waiver than upon one claiming an estoppel. The fact of waiver must be established clearly and convincingly, and there must be strong proof of the existence of an intent on the part of the one waiving to relinquish a known right.

The leading Montana case on waiver is *Swords v. Occident Elevator Co., 72 Mont. 189, 195, 232 Pac. 189, where* it is said:

> *"A waiver is the intentional relinquishment of a known right.* Murray v. Heinze, 17 Mont. 353, 42 Pac. 1057, 27 R. C. L. 904, 8 Words & Phrases, First series, 73, 75 (* * *)." (Emphasis supplied).

The general rule is stated in *31 C. J. S. 461* as follows:

"The intention to waive the right or advantage in question *must be shown clearly and convincingly.* The best evidence of intention is to be found in the language used by the parties. *When the only proof of intention rests in what a party does or forebears to do, his acts or ommission to act which were relied relied on should be so manifestly consistent with, and indicitive of an intent voluntarily to relinquish a then known particular right or benefit that no other reasonable explanation of his conduct is possible* * * *. To establish waiver, it has been stated that the evidence must indicate a meeting of the minds as well as the intentional forebearance to enforce the right in question." (Emphasis supplied).

A further rule is that where there is no agreement in support of a waiver, there must be an element of estoppel. The rule is stated in *Gerard v. Sanner, et al, 110 Mont. 71, 79, 103 Pac. (2d) 314, supra:*

"It is well settled that in the absence of acts constituting estoppel, there must be consideration for waiver. 'A waiver, to be operative, must be supported by an agreement founded on a valuable consideration, or the act relied on as a waiver must be such as to estop the party from insisting on performance'. (Citing cases)."

Further, the Montana Court said in the Gerard case:

"Waiver must be manifested in some unequivocal manner and to operate as such it must, in all cases, be intentional. There can be no waiver unless so intended by one party and so understood by the other."

Again it is said that there can be no conjecture in determining the existence of the waiver, the rule being stated in *31 C.J.S. 282:*

> "A waiver must be manifest in some unequivocal manner, it will not be implied or deemed to exist except where there has been some absolute, positive and unequivocal action or inaction in consistent with the right in question."

A reading of these general rules is alone sufficient to show how far short appellees have fallen in producing proof that would support Conclusion of Law No. VI.

The basic element of proof of waiver is intent to relinquish a known right. The action of the witness Wight, who was representing the appellants generally in the handling of these lands, in offering them for lease to Gadbois (Tr. 275, 276, 296, 297, 304, 306) completely refutes any intent on his part to relinquish the claim that the Fidelity Operating Agreements had expired. The record is uncontradicted that Susan Wight, sometime in 1950, sent a notice to appellees, Fidelity Gas and Montana-Dakota Utilities that the Fidelity Operating Agreement had expired. Reference has been made to the letters sent by H. C. Smith (Plaintiffs' Ex. 30) and the notice of Cedar Creek (Plaintiffs' Ex. 21) (Tr. 420, 433) show affirmatively there was no intention to relinquish.

As has already been pointed out, there was no estoppel to support a finding of waiver.

There being no proof of intention to waive the claim the Fidelity Operating Agreement had expired and there being

no estoppel the Court was clearly in error in reaching its Conclusion of Law No. VI.

## IV

## APPELLANTS WERE NOT GUILTY OF LACHES

It was error for the Trial Court to hold that the appellants were guilty of laches. Specification of Error No. 10.

By Conclusion of Law No. IV, the Trial Court found the appellants, and each of them, guilty of laches, the conclusion reading:

> "Plaintiffs, and each of them, are guilty of laches and barred from obtaining a judgment and decree of this Court cancelling or forfeiting the Fidelity Operating Agreements to which they have committed their respective interests."

Again we point out that this is not an action to cancel or forfeit, but one to quiet title.

No special finding of fact in support of the conclusion is made, nor is there any mention made of laches in the memorandum of the Trial Court. Whether the general findings are sufficient, if supported, to meet the requirements of Rule 52 is doubtful. Rule 52(a) provides:

> ". . . the Court shall find the facts specially . . ."

In view of the comments of the Court in its memorandum, (Tr. 178) which makes it clear that the judgment is based entirely on the finding of estoppel, it would seem the general findings were not intended by the Court to be special findings on the question of laches. Certainly the emphasis on the matter of estoppel must leave this Court

in doubt as to the Trial Court's reasons for concluding that appellants were guilty of estoppel.

Obviously there could be no laches on the part of the appellants prior to receipt of the letter of April 27, 1951, when appellants were first apprised that Fidelity Gas and Montana-Dakota Utilities, or either of them, claimed the Fidelity Agreements to be valid and subsisting agreements affecting the lands of the appellants. As was pointed out in the section of the argument on estoppel, and as will be pointed out later in this brief, the Court correctly held the Fidelity Operating Agreements to be options which ipso facto terminated upon the failure of the lessee to exercise the option. *2 Summers Oil and Gas 497, 501.*

Appellants had no reason for taking any affirmative action, at least prior to receipt of the letter of April 27, 1951. (Plaintiffs' Ex. 26). The delay then upon which the findings of laches would have to be based would be from no earlier than April 27, 1951, the date of this letter, and February 2, 1953. Under the decision in *Bowes v. Republic Oil Co., supra,* it would seem that a lapse of time in filing the suit would not be significant if it did not have its inception after appellees had moved in on appellants' lands. Under that decision there would be no duty to act until trespass upon appellants' lands.

While it is true that where an equitable remedy is sought, the Court may refuse its aid, although the period which has elapsed without suit is less than that prescribed

by the statute of limitations, the rule is as stated by this Court in *City of Roswell v. Mountain States Telephone & Telegraph Company, 78 Fed. (2d) 379:*

> "A court of equity is not bound by a statute of limitations, but in the absence of extraordinary circumstances it usually grants or withholds relief in analogy to it."

The author in 10 Cal. Jur. 525, put it this way:

> "Where a statute of limitations applicable at law furnished an analogy by which courts of equity could be guided, they generally followed it in applying the doctrine of laches though they were not bound to do so."

The rule is stated in *30 C. J. S. 557:*

> "Where there is a corresponding legal right or remedy, although equity may have exclusive jurisdiction over the enforcement of the right, courts of equity ordinarily will apply the statute of limitations by analogy, and it has been held that where the suit has been based on a legal instead of an equitable ground, defendant is entitled to the benefit of the legal limitations statute. In such cases, the equity court is not strictly bound by the statute and although it will generally consider the time fixed thereby as having some bearing on the question of laches, it may consider the circumstances and apply its own rules with respect to laches; while laches will generally follow the law of limitations and relief, ordinarily it will be denied if the suit is brought after the expiration of the statutory period, yet relief may be granted after that time if special circumstances exist which would make the refusal of relief inequitable * * *."

The Montana Statute of Limitations, in effect at the time of this action was brought, was *Section 93-2504, R. C. M., 1947,* reading:

> "No action for the recovery of real property or for the possession thereof can be maintained unless it appears that the plaintiff, his ancestor, predecessor or grantor was seized or possessed with the property in question within 10 years before the commencement of the action * * *."

Here if there was any delay of which the Court can take cognizance, that delay would be from April 27, 1951, to February 2, 1953, a total of 21 months. This would be less than 1/6th the period of the Statute of Limitations, and would fall far short of the standard as to delay suggested by the Court in the *Cit yof Boswell v. Mountain States Telephone and Telegraph Company, supra.*

The one essential of laches is long delay in the assertion of the right. It is for that reason that Courts sitting in equity apply the applicable statute of limitations in measuring the lapse of time required to support a finding of laches except in the most unusual cases. The delay of 21 months does not make their claim stale within the authorities.

Laches is a sort of estoppel and closely comparable to an estoppel, the rule being stated in *19 Am. Jur. Pru. 334:*

> "The situation which is contemplated by the maxim (equity aids the vigilant) is that which is created where the individual having knowledge of the right which he may assert has failed to act, with the result

that another has acted upon the assumption that such rights do not exist, or will not be asserted. The doctrine of estoppel as applied to this situation is in practical view, the equivalent of the maxim in question."

What is said in part 1 of the argument in this brief as to estoppel has application. The elements of estoppel not being present, it would not seem that laches could be found in any event.

The Court was clearly in error in concluding that appellants were guilty of laches.

## V

## THE FIDELITY OPERATING AGREEMENTS EXPIRED BY THEIR OWN TERMS

While the Court correctly held that the Fidelity Operating Agreement was an option, Finding of Fact No. XIV, (Tr. 192) it erred in not finding that the option had not been exercised by the Fidelity Gas Company and that therefore the Fidelity Operating Agreements had expired many years prior to the commencement of this litigation. (Specification of Error No. 12).

Because of its importance to this section of the argument, we set out here in full Finding No. XIV:

"Under the terms of said Fidelity Operating Agreements Fidelity Gas Company was bound to commence drilling of a test well somewhere on the Anticline within one year after the execution of certain operating agreements. In the event said test well failed to encounter commercial production, Fidelity Gas

Company, under said Fidelity Operating Agreements had the option to drill additional test wells within the time required by good oil field practice in a wildcat area. There is no evidence in the record as to what constitutes good oil field practice in a wildcat area as regards the time between the completion of an unsuccessful well and the commencement of a new well. In the event oil of commercial quality and in paying quantities was encountered in the first or any subsequent test well drilled under the Fidelity Operating Agreement on the Cedar Creek Anticline, Fidelity Gas Company was required to commence drilling of an additional well or wells within one year from the completion of the first commercial well, and so on, with the purpose of progressively extending the production limits of said Anticline toward and upon the lands covered by each Fidelity Operating Agreement."

Appellants contend that by the terms of the Fidelity Operating Agreements themselves, drilling of the Carter well in 1941 and of the Husky well in 1949 is not the drilling contemplated to constitute an effective exercise of the option contained in Section 4 of the Fidelity Operating Agreements. For the convenience of the Court, Section 4 is again set out in full:

"4. After completion or abandonment of said well, second party shall have the right, at its option, to prosecute such further drilling of wells under like terms and conditions, and at such times as shall be deemed by it to be good oil field practice, having due regard that the drilling operations hereunder are purely exploratory and speculative, and also having

> due regard to weather and road conditions. In the event that under customary oil field practice in prospecting a wild cat area, second party shall be unable to commence the drilling of a new test well before September first of any years, the commencement of any such well may be deferred, at the option of second party, until the following first day of April."

The Court held that a determination of the time in which the option could be exercised depended upon what is good oil field practice in a wild cat area, and that there was not evidence sufficient on that point to enable the Court to arrive at a decision on the point. (Tr. 175, 176). In its memorandum opinion, the Court expressed the view that the delay in drilling the Carter and Husky wells seemed, in the language of the Court:

> ". . . to be a rather long time without any drilling being done * * *."

Appellants believe that there is no need for recourse to expert testimony as to what constitutes good oil field practice, to determine whether or not the option had been exercised. It seems to us a time is expressed in Section 4. That expression, we admit, could have been stated in happier words, that would have left no doubt, but we believe the time is sufficiently stated so as to rule out any possibility that the drilling of the Carter well, commencing in 1941, and the drilling of the Husky well, commencing in 1949, are within the time contemplated by the agreement.

Section 4 says the time in which the option may be exercised shall be that deemed by Fidelity to be ". . . good

oil field practice." This language does not stand alone. It is modified in the same sentence to the effect that ". . . due regard to its drilling operations hereunder are purely exploratory and speculative," shall be had, and also ". . . due regard," shall be taken of ". . . weather and road conditions."

In the next sentence of Section 4, that time for the exercise of the option, is further indicated as being ". . . customary oil field practice in prospecting a wild cat area," and the weather and road conditions that are to be considered are nailed down.

The good oil field practice and customary practices mentioned in the paragraph seem clearly to relate to weather, season and roads. The references to weather, season and roads indicate that the parties contemplated Fidelity Gas would be justified in delay in commencing new wells if weather, season and the roads would make it difficult to operate. It is also apparent that the parties took into account the fact that in a wildcat area, roads and improvements would not be in existence. If it were contemplated that drilling could be delayed more than a year, reference to weather and road conditions would seem superflous. Under paragraph 3 of the agreement, Fidelity is required to commence drilling operations within one year from the date of the execution of the Operating Agreement in the area where the first well was to be drilled. We think that provision is significant in trying to arrive at the intention of the parties, as expressed in Section 4.

Certainly nothing in paragraph 4 suggests that drilling can be delayed from 1937 to 1941 and from 1941 to 1949.

The conduct of appellee, Fidelity Gas, in its operations in 1936 and 1937, indicates its construction of the option. Pursuant to paragrah 3 of the agreement, the first well was commenced in August, 1935, in Unit 8-A. (Plaintiffs' Ex. 2 (Tr. 542). This well, the NP No. 1, was completed in October, 1936. (Tr. 543). The next well, the Warren in Unit 5, was commenced in the same month that the NP No. 1 was completed, and the third well a few days later. (Tr. 544). Paragraph 4 of the Fidelity Operating Agreement would not require such speed, but obviously it was good field practice in the view of appellee, Fdielity to start immediately on new drilling, or it would not have moved so promptly. The least that can be said of its actions in 1935 and 1936 is that a claim that delays of three and a half years between the completion of the Warren and Smith wells in 1937, and the commencement of the Carter well in 1941 (Tr. 552) and that the delay of more than seven years from the completion of the Carter well to the commencement of the Husky well are contemplated by paragraph 4 of the Fidelity Agreement, is not consistent with appellee's own action.

Paragraph 4 must, of course, be read with the balance of the contract. The consideration recited from the Agreement is $10.00, and other valuable considerations. No provision was made for delay rentals. The other valuable considerations are exploration, drilling, development and

production. The appellees and their predecessors could only profit from the Fidelity Operating Agreements if there was exploration, development and production. Paragraph 4 must be read with that primary consideration in mind, and when it is so read, it is obvious that the drilling of two dry holes 35 miles south of the lands of the appellants in a 15-year period, is not the exploration, drilling and development contemplated by paragraph 4 of the Fidelity Operating Agreements.

If there is doubt as to the time within which the option had to be exercised, the language would have to be construed against appellees.

The Fidelity Operating Agreements were drafted by Fidelity. (Tr. 583). The rule applicable is stated in *12 Am. Jur. Pru. 795:*

> "Doubtful language in contracts should be interpreted most strongly against the party who uses it. A written agreement should, in cases of doubt, be interpreted against the party who has drawn it. * * * It is said that an instrument uncertain as to its terms is to be most strongly construed against the party thereto who causes such uncertainty to exist."

In *E. I. DuPont Denemours & Co. v. Claiborne-Reno Company, 64 Fed. (2d) 225, 89 A. L. R. 238, 245,* the Court holds:

> "The language of a contract will be construed most strongly against the party preparing it (Citing cases)."

In the *American Law Institutes Restatement of the Law of Contracts, Section 236,* the text says:

> "(d) Where words or other manifestations of intention bear more than one reasonable meaning, an interpretation is preferred which operates more strongly against the party from whom they proceed * * * (Citing cases)."

The reason for the rule is stated in *17 C. J. S. 751:*

> "* * * the reason for the rule being that a man is responsible for ambiguities in his own expressions and has no right to induce another to contract with him on the supposition that his words mean one thing, while it hopes the Court will adopt a construction by which they would mean another thing more to his advantage, * * *."

There is testimony that the language of the contract was discussed and that some changes were made, but there is no testimony that there were any changes in paragraph 4, or any of the other provisions of the contract relating to the time for the exercise of the option. (Tr. 583).

There is a further rule that requires a holding in favor of the appellees on the matter of the time for the exercise of the option, and that is that oil and gas leases are always construed against the lessee. That rule also applies to any ordinary option. The foundation of that rule in Montana is the opinion in *Snyder v. Yarbrough, 43 Mont. 203, 115 Pac. 411.* See also *Brown v. Wilson, 58 Okla. 392, 160 Pac. 94; Flank Oil Company v. Belleview Gas & Oil Company, 29 Okla. 719, 119 Pac. 260.*

In *Solberg v. Sunburst Oil & Gas Company, 76 Mont. 254, 283, 246 Pac. 168,* after holding the lease there in question to be a mere option, the Court says:

> "It is merely an optional contract, and in conformity with the trend of modern authority generally, and for the reasons above stated, have heretofore held that in such a contract, time is of the essence of the contract where its terms do not so provide, and *that the provisions of such lease are to be liberaly construed in favor of the lessor.* (Citing cases).

In *McDaniel v. Hager-Stevenson Oil Co., 75 Mont. 356, 366, 243 Pac. 582,* the rule is stated thus:

> "When a contract is optional in respect to one party, it is to be construed strictly in favor of the party that is bound and against the one who is not bound (Citing cases). Not only that, but it is a recognized doctrine in this court that oil and gas leases are to be construed liberally in favor of the lessor and strictly against the lessee."

Under the Fidelity Operating Agreements, the only ones bound were the lessors. Fidelity was perfectly free to either exercise its option or do nothing, as is true of any ordinary option. Under the authorities cited, the Fidelity Operating Agreements should be construed, if there is ambiguity as to the time element, in favor of the appellants.

Still another rule exists which would seem to require this Court to determine that appellees had not exercised the option upon the record which is before it, and which is complete, is that forfeiture and termination of oil and

gas leases are to be favored. There are numberless cases supporting this statement, and this brief will not be burdened with extensive citations. The rule is briefly stated in *McNamara Realty Company v. Sunburst Oil & Gas Company, 76 Mont. 332, 352, 240 Pac. 166:*

> "It must be remembered also that the instrument construed here is an oil and gas lease under which the general rule that forfeitures are looked upon by the law with disfavor gives place to the rule that because of their nature, forfeitures under such leases are favored in the law."

In *Abell et al, v. Bishop, 86 Mont. 478, 497, 284 Pac. 525,* the rule and the reasons for it are stated more fully:

> "* * * owing to the peculiar product to be produced, and the fact that the purpose of such lease is to have the land explored and tested for oil rather than to yield ground rental, it has been found necessary to guard the rights of the landowners as well as the public by numerous covenants and provisions, some of the most stringent kind, to prevent the lands from being burdened by unexecuted and profitless leases, and the forfeiture for non-development is essential to private and public interest in relation to the use and alienation of property, (1 Thornton's Law of Oil and Gas 596); consequently the general rule that forfeitures are not favored in the law, does not apply to leases for the purpose of having lands explored for oil and gas; rather, in this class of cases, forfeitures are favored (McNamara Realty Company v. Sunburst Oil and Gas Co., 76 Mont. 332, 247 Pac. 166) and such provisions as that under consideration are to be con-

strued liberally in favor of the lessor bound thereby and strictly against the lessee who is not bound. Time is of the essence of the contract, and forfeiture follows immediately on default * * *."

The language of these decisions has direct application to the facts in the present case. Here there was no cash consideration paid, nor is there any provisions for delay or ground rental. The only consideration flowing to the appellants is exploration and development, with consequent payment to the appellants out of production. Here the appellees are seeking to have the Court declare that these lands have been burdened by an unexecuted and profitless lease for 17 years. Under all of the rules of construction and rules applicable to oil and gas leases stated above, the Court was clearly in error when it failed to find that the Fidelity Operating Agreements, insofar as these appellants are concerned, terminated upon the failure to exercise the option promptly after the completion of the three wells drilled during the years 1935, 1936 and 1937.

## VI

## IF THERE IS AMBIGUITY IN THE MEANING OF PARAGRAPH 4 OF THE FIDELITY OPERATING AGREEMENT, THEN THE COURT ERRED IN EXCLUDING THE TESTIMONY OFFERED AS TO THE CIRCUMSTANCES UNDER WHICH THE PARAGRAPH WAS NEGOTIATED.

Appellants have specified as Error No. 14 the action of the Trial Court in excluding proferred oral testimony as to the circumstances under which paragraph 4 of the Fi-

delity Operating Agreement was negotiated. The witness Wight was asked to detail the circumstances surrounding the discussions of the Fidelity Operating Agreements at the very time they were signed, particularly with reference to paragraph 4. (Tr. 253, 254, 255, 290, 291, 292, 293, 294). The Court sustained objections to the testimony offered.

If the Trial Court is correct in finding that there was ambiguity as to the time the option could be exercised, the rule to be applied is as stated in *2 Jones on Evidence 861:*

> "On the other hand, in order to show what was in the minds of the parties at the time of executing the instrument, parol evidence is admissible where it appears that the language of the writing is ambiguous or susceptible of more than one interpretation, or where an indispensable term or factor can not be ascertained therefrom. One who is aggrieved is entitled to have the court place itself in a position of the parties with the view to ascertain the true meaning of the language of the instrument, and to have the court resort to evtrinsic evidence if necessary for that purpose."

In the leading Montana case of *Ming v. Pratt, 22 Mont. 262, 36 Pac. 279,* the Court ruled:

> "As aids to an understanding of a written contract, but not to alter its terms, the surroundings of the parties, the subject matter, and even prior and contemporaneous oral negotiations and promises as illumining the design and intent, may perhaps be proved; but resort to such evidence is proper only where necessary, and is not permissible where the intention and understanding are explicitly declared upon the face of the writing itself."

The Court concludes in the following language which has direct application to our case:

> "The trial court, over objections, permitted certain witnesses for the plaintiff to testify to offers they had received with respect to drilling on the Pewters' permit prior to the negotiation with defendant corporation * * *. Section 105, 107, R. C. M. of 1921 (now 93-401-13, R. C. M. 1947) after prohibiting the reception of evidence to the terms of a written agreement, other than the writing itself, with certain exceptions, declares that the provisions of the section do "not exclude other evidence of the circumstances under which the agreement was made. Clearly an explanation of the circumstances and *a repetition of the conversation between the parties at the time of making of the contract* fall within the contemplation of this section. (Citing cases). The admission of this testimony is not error." (Emphasis supplied).

The Court's attention is also called to the decision in *Brown v. Homestake Exploration Co., 98 Mont. 305, 39 Pac. (2d) 168,* where the Montana Court had under consideration an oil and gas lease. The question there under consideration was the number of wells to be drilled under the lease, and the facts were most similar to those in the instant case. The Court held the conversations that took place at the time of the making of the contract concerning the meaning of the ambiguous provision to be admissible. After citing and quoting from decisions to the effect that where the terms of a contract are plain and unambiguous, resort may not be had to extrinsic circumstances under the pretense of ascertaining its meaning, the Court said:

> "The contract in question does not come within the foregoing rule. Construction is necessary to determine its meaning as to the number of wells to be drilled."

We conclude by calling the Court's attention to the general statement found in *20 Am. Jur. Pru. 999:*

> "Whenever the terms of a contract are susceptible to more than one interpretation, or an ambiguity arises, or the extent and object of the contract cannot be ascertained from the language employed, parol evidence may be introduced to show that it was in the minds of the parties at the time of making the contract that determined the object on which it was designed to operate."

If this Court determines there was ambiguity in the meaning of Section 4 of the Fidelity Operating Agreements, then the Trial Court was clearly in error in excluding the proferred testimony.

## VII

## IT WAS THE DUTY OF THE APPELLEE, FIDELITY GAS COMPANY TO DILIGENTLY AND WITHIN A REASONABLE TIME, CONTINUE EXPLORATION FOR OIL IN THE DEEPER SANDS.

As a corollary to their position that the Court erred in failing to find that the appellee Fidelity Gas had failed to exercise its option under the Fidelity Agreements, appellants specify as error, the failure of the Court to find that appellees had failed to diligently, and within a reasonable time, continue exploration for oil in the deeper sands. (Specification of Error No. 13).

In every oil and gas lease is an implied covenant that the work of exploration, development and production shall proceed with reasonable diligence for the common benefit of the parties, or that the premises be surrendered to the lessor. In the leading Montana case of *Berthalote v. Loy Oil Company, 95 Mont. 434, 445, 28 Pac. (2d) 187,* the Court held:

> "Where, as here, a lease is granted for a nominal and initial consideration, and the lessee agrees to pay in return therefor a share of the oil or gas produced from the land, it is apparent that the principal consideration of the grant, is the promise of the lessee to pay the royalty. The payment of the royalty is, however, contingent upon production. Where the real purpose is thus disclosed, but the lease does not contain in itself express provisions creating duties in the lessee to do such acts as were necessary for the accomplishment of that purpose, the law implies them (Summders Oil and Gas 391; Merrill on Implied Covenants 18-21; Thornton on Oil and Gas, 5th Ed., Sections 154-157).
>
> "The Courts have implied various covenants in oil and gas leases in furtherance of this purpose as is illustrated by the following cases: Brewster v. Lanyon Zinc Co., 140 Fed. 801, 809, 72, CCA 213, (and other cases)."

After quoting from *Brewster v. Lanyon Zinc Company, supra,* the Montana Court said:

> "These implied covenants are conditions of the lease under consideration and upon the plain and substantial breach thereof the lease became terminated,

and no longer of any force or effect, although still appearing on the records as an effective disposal of oil and gas under the leased lands."

In *Brewster v. Lanyon Zinc Company, supra,* an oil gas lease similar in terms to the ordinary "unless" lease was under consideration. After pointing out that the consideration that flows from the lease is production, the Court in the Brewster case said:

> "The implication necessarily arising from these provisions * * * the work of exploration, development and production should proceed with reasonable diligence for the common benefit of the parties, or the premises be surrendered to the lessor.
>
> "The object of the operations being to obtain a benefit or profit for both lessor and lessee, it seems obvious, in the absence of some stipulation to that effect, that neither is made the arbitrar of the extent to which, or the diligence of which the operation shall proceed, and that both are bound by this standard of what is reasonable."

In a case in which the facts are strikingly similar to those in question, *Sauder v. Midcontinent Petroleum Company, 292 U. S. 272, 54 S. Ct. 671,* two small wells had been drilled on a portion of the lands involved. On the basis of these two wells that were producers, the lessee attempted to hold all of the lands for a period of 17 years without drilling further wells. Here, on the basis of one dry test well, appellees are trying to hold approximately 4,500 acres for a period of 18 years. The language of the Sauder case fits the facts in this case perfectly:

"This definition of the scope of the implied covenant (from the Brewster case) has been generally adopted in the decisions of the federal and state courts. The facts demonstrate that the respondent (lessee) has not complied with its obligations. It has held a half section for 17 years without the drilling of an exploratory well, and claims to be entitled to hold the lease for an indefinite period with no exploration unless some other operator brings in a producing well on adjoining land, or fresh geological data comes to light * * *. The justification for the respondent's position is that the geologic data and the experience upon surrounding lands are both unfavorable to the discovery of oil or gas upon the east half of section 16 (a 320 acre tract) * * *. The production of oil on a small portion of the leased tract cannot justify the lessee's holding of the balance indefinitely and depriving the lessor, not only of the expected royalty from production pursuant to the lease, but of the privilege of making some other arrangement for availing himself of the mineral content of the land."

The breach of this implied covenant alone terminated the Fidelity Operating Agreement. When considered in the light of paragraph 4 of the Fidelity Operating Agreement, there can be no doubt but that the Court erred in failing to hold that the option had not been exercised and the agreement ipso facto terminated. It was clearly error for the Court to fail to find breach of the implied covenant to diligently explore, drill and develop the lands in question.

## VII

## THE FIDELITY OPERATING AGREEMENTS CLEARLY TERMINATED BY ABANDONMENT.

Appellants urge that the Trial Court erred in not finding that the Fidelity Operating Agreements were terminated by abandonment. (Specification of Error No. 15). By their pleading, appellants contend that if the Fidelity Operating Agreements were not terminated by failure of Fidelity Gas to exercise the option within time, or if the agreements did not terminate by reason of the breach of the implied covenant to diligently explore, drill and develop, then the agreements terminated by abandonment. The burden is cast upon us by the rule that findings of fact will not be set aside unless clearly erroneous, the rule being as stated in *Rule 52(a), Federal Rules of Civil Procedure:*

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge with the credibility of the witnesses."

The testimony upon which appellants contention of abandonment is bottomed is that relating to certain conversations between the witnesses Wight and Jirik on one hand the witnesses Cecil Smith and R. M. Heskett on the other. There is sharp conflict in the version these witnesses give of the conversations, but we think all of this testimony considered as a whole as to the conversations, together with the actions of the parties, will demonstrate that the Trial Court was clearly in error in making its finding that there was no abandonment. (Finding of

Fact No. XXII) (Tr. 196) Conclusion of Law III (Tr. 200) Memorandum (Tr. 177). In its memorandum, the Trial Court found that the evidence concerning the statements made by officials of appellee Fidelity Gas Company and appellee Montana-Dakota Utilities Company: " . . . was unconvincing."

Appellants earnestly contend that the testimony was convincing, and that it was supported by the conduct of all of the parties. The testimony of the witness Wight, who was handling all of these properties for the appellants for the purpose of renting it for oil and gas and of the witness Jirik, president of Cedar Creek, that they thought from 1938 to 1951 that the agreements had terminated, is clear, convincing and absolutely uncontradicted, and may not be ignored. (Tr. 27, 73, 76, 384, 385, 419, 420, 421). It is also clear that they gained this idea through the conversations with Cecil Smith and Heskett. (Tr. 421, 272). The conduct of Wight and Jirik was consistent with their version of the conversations. From 1938 on, Wight periodically sought to lease the lands for oil exploration. (Tr. 272). Certainly Wight and Jirik thought the conversations were a clear statement of an intention to abandon any rights Fidelity might have had under the Fidelity Operating Agreements and conducted themselves accordingly.

Briefly the conversations upon which Wight and Jirik relied in reaching their conclusion that Fidelity had abandoned its rights under the contract, are as follows:

Wight's first conversation was with Heskett, president f Fidelity and of MDU. The substance of the conversation contained in this testimony of the witness:

"Q. Tell us what that conversation was between you and Mr. Heskett?

A. I went down there to see him if I could get them to go deeper because I thought there was a possibility of encountering oil at a greater depth. He told me definitely at that time they were through drilling for oil, had gotten their hands burned, so to speak, and the stockholders were complaining about spending so much money; they were definitely through drilling for oil, not going to do anymore development as far as oil was concerned; they were going to stick to drilling for gas."

Tr. 264). Further, with relation to the conversation with leskett, Wight testified:

"He told me, as I stated a minute ago, definitely they were through drilling for oil, but I was free to do whatever I wanted to do; if I had some proposition whereby they could get the well drilled deeper, they would be willing to listen to it, but as far as they were concerned, they were definitely through with any more oil wells."

Tr. 265).

Heskett's testimony consisted of a caegorical denial that e had made the statements attributed to him by Wight. Tr. 626). On cross-examination, after pointing out that e and Wight were not friendly, Heskett stated that he idn't recall that Wight had been in his office at all during

the years 1935, 1936, 1937 and 1938. (Tr. 627). Wight testified that he had been in Heskett's home at the same, which Heskett denied. (Tr. 628).

The witness Jirik testified that he had a visit also with Mr. Heskett in Mr. Heskett's private office sometime late in 1937. (Tr. 415). His testimony is that:

> "Mr. Heskett told me that they got a dry hole, and that they spent too much money. They were criticized by the stockholders and they were all through drilling for deep oil in the Baker field."

(Tr. 416). Again Heskett, on his testimony, denied categorically the making of the statement attributed to him by Jirik. (Tr. 626). Heskett did recall that Jirik called in to see him occasionally, and may have been in during 1937. (Tr. 627).

Wight also talked to Cecil Smith within a year after the abandonment of the Warren well, which occurred in January of 1937, and his testimony is that:

> "Cecil Smith told me definitely they were through with any further exploratory work for oil; * * *."

(Tr. 270).

Referring to Heskett, Smith and other officials of Montana-Dakota Utilities Company and Fidelity Gas Company, Wight testified:

> ". . . they told me firmly and definitely they were through with drilling and further exploratory oil wells, and as far as I was concerned, I was free to do what I wanted to with the oil rights."

(Tr. 270).

At the same time, Jirik had his conversation with Heskett, he talked to Cecil Smith. When asked what his discussion was with Smith, Jirik replied:

> "I said: 'Mr. Heskett just informed me you folks were not going to do any more in the Baker field'. He said: 'We are not. We are all through'."

In a later visit in 1938, in the company of Mr. Seivers with Cecil Smith, Jirik stated the discussion as follows:

> "Mr. Seivers was disappointed and asked Mr. Smith, he said he understood they had given up drilling any deep wells, and Cecil Smith said, 'We absolutely have, we are not spending any more money, and we have given up drilling, deep drilling in the Baker field'."

As was the case with Heskett, Smith categorically denied the statements attributed to him by Wight. (Tr. 567). He denied there had even been a discussion of the deepening of the Warren well. Smith claimed on his original testimony, that Wight had not even been in his office during the years 1937 and 1938 because of litigation pending between Wight and Montana-Dakota Utilities, and that the feeling between the two was unfriendly. (Tr. 568, 582, 620, 621, 622). On cross-examination, Smith was forced to confess that during the period when he said that Wight was not in his office and not likely to be there, he was carrying on detailed discussions and correspondence with Wight regarding another gas field, and a letter couched in friendly and personal terms dated December 14, 1938,

from Smith to Wight was introduced as Exhibit 53. (Tr. 623). The letter established that Wight had been in the office a few days previous to the date of the letter. (Tr. 623). The painful attempt of Smith to extricate himself from his prior testimony casts very real doubt on the truth of any of it. (Tr. 624). Plaintiffs' Exhibit 54 (Tr. 629, 630) shows conclusively that Smith's attempt to show that Wight's relationship with him were such that Wight would not be in his office anytime during 1937 and 1938, to be either fabrications or the results of an extremely faulty memory. In either event, his testimony denying his statements to Wight becomes of little value.

Smith also categorically denied the statements attributed to him by Jirik. (Tr. 632).

Recognizing again the right of the Trial Court to pass upon the credibility of the witnesses based upon the appearance of the witness on the stand, nothing about the appearance of the witness Cecil Smith could possibly overcome the effect of the change in his story as to Wight's visits to his office, and as to the relationship that existed between himself and Wight during the years 1937 and 1938, and we submit that the record shows the Trial Court was clearly in error in accepting Smith's version of the conversations with Wight and Jirik. The most that can be said of Heskett's testimony is that he did not recall the conversations.

But there are circumstances here in the conduct of appellees Fidelity Gas and Montana-Dakota Utilities that cor-

roborate the version of the conversations given by Wight and Jirik. As has been pointed out, the purpose of the Fidelity Operating Agreements was to secure exploration, drilling and development of the lands included in the agreements on the Cedar Creek Anticline. The drilling that occurred in 1935, 1936, 1937 carried out the purpose and object of the agreements. The witness Cecil Smith admitted on the stand that in 1938:

> "We had quit our drilling program, * * *."

In other words, Fidelity did just exactly what Smith denied he told Wight and Jirik he was going to do. Jirik said Cecil Smith told him that Fidelity had:

> ". . . given up drilling any deep wells," and that "we are not spending any more money and we have given up drilling, deep drilling, in the Baker field." (Tr. 418).

Again Jirik says Smith told him that Fidelity was not going to do any more drilling in the Baker field, and that Fidelity was all through. (Tr. 416).

Wight testified that Heskett told him that Fidelity was definitely through drilling for oil. (Tr. 264). Smith told him that Fidelity was definitely through drililng for oil, but that Wight was free to do whatever he wanted to. (Tr. 265). The statements attributed to Heskett and Smith exactly state what happened. From the time of the statements of Smith and Heskett in 1937 and 1938, neither Montana-Dakota Utilities nor Fidelity spent a cent in the way of testing, drilling, seismic work or otherwise

under the Fidelity Gas Contract. (Tr. 607). At the time of the conversations, all drilling activities on behalf of Fidelity or Montana-Dakota Utilities had ceased. Those activities ended with the completion of the Warren and Smith wells as dry holes in 1937, though there was some testing on the Smith well into 1938. (Tr. 544, 545). There was no actual drilling after 1937. (Tr. 544, 545).

The actions and conduct of Smith and Heskett as officers of the appellee corporations, are completely inconsistent with their denial of the truth of their conversations as reported by Wight and Jirik and makes their testimony as to the conversations completely incredible and leaves the testimony of Wight and Jirik, in effect, uncontradicted. The truth of the testimony of Wight and Jirik is corroborated by the statement of Cecil Smith that Fidelity had quit its drilling program, and by the action of Fidelity in terminating entirely in 1937 its driling program.

The Trial Court's determination that there was no abandonment is based on its view that appellants failed to establish an intent on the part of Fidelity to abandon its rights under the Fidelity Agreements. Memorandum (Tr. 177). If the testimony of Wight and Jirik as to the conversations with Cecil Smith and Heskett is believed, the intention to abandon is clearly established. There are many definitions of abandonment. *1 C. J. S. 5,* defines abandonment as:

> ". . . the intentional relinquishment of a known right; the relinquishment of a right by the owner

thereof without any regard to the future possession by himself or any other person, and with the intention to forsake or desert the right; etc."

Under paragraph 4 of the Fidelity Operating Agreements, Fidelity had a right by drilling additional wells to keep the Fidelity Operating Agreement alive. When Fidelity, through its officers Smith and Heskett, in Smith's own words "quit their drilling program" they abandoned their right to keep the Fidelity Operating Agreements alive by drilling. The only way the agreements could be kept alive was by drilling under paragraph 4. When they quit the drilling program, and anounced they were quitting it, they were intentionally relinquishing, on behalf of appellee Fidelity, the right to keep the agreements alive. Then and there, their rights under the Fidelity Agreements were relinquished. By their statements and their conduct they established the intention to forsake or desert the right to keep the Operating Agreements alive. *1 C. J. S. 5.* The abandonment was expressed and it was voluntary within the requirements of the rules. *1 C. J. S. 9.* Once abandonment takes place, the title or ownership of the property abandoned divests forthwith, *1 C. J. S. 18.* Anything Fidelity did by way of vague actions to include the lands of the appellants in negotiations with other oil companies at a later date, could not serve to revest it with title.

Abandonment is more readily found in this case of oil and gas leases than in ordinary cases. A case similar on the facts to the instant case is *Hall v. Augur, 256 Pac. 232, 82 Cal. App. 594:*

"Abandonment will be more readily found in the case of oil and gas leases than in most other cases. In Harris v. Riggs, 63 Ind. App. 201, 121 N. E. 36, it is said: 'Such a lease may be abandoned, and when once abandoned by the lessee, cannot thereafter claim or enforce any right thereunder without first securing the consent of the lessor or a renewal of time. (Citing cases).

"It has been held and supported by sound reason that abandonment may be more readily found in cases of oil and gas leases than in most other instances. The rights granted under such leases are for exploration and development. The title or interest granted is inchoate until oil or gas is found in quantities warranting operations, and courts will not permit the lessee to fail to develop the lease for speculative or other purposes except in strict compliance with this contract for a valuable and sufficient consideration other than such developments. (Citing cases)."

There is testimony on behalf of the appellees that in negotiations between Fidelity and Carter and Husky the lands involved had been included in a discussion of the lands which might be covered by the agreements with Carter and Husky. (Tr. 51, 612). It will be noted that Smith does not testify that the specific lands of the appellants were included in his reference to the lands in Unit 5. It is undisputed that from 1938 to 1951 appellees, neither by word nor act, indicated to appellants that appellees were still claiming under the Fidelity Operating Agreements. In *3 Summers Oil and Gas, page 26,* the author states:

> "The lessee's intention to abandon is not his secret intention to hold the property for speculative purposes, but his legal intention is determined by his conduct."

The conduct that determines the controlling intent, i. e., the legal intent, are the statements of Smith and Heskett, the cessation of the drilling operations by Fidelity, and the silence of Fidelity and its officers. The secret intent to try to hold appellants' properties under the terminated agreement is not sufficient to establish the intent not to abandon.

Abandonment of the purpose of an agreement or lease is abandonment of the agreement or lease itself, as stated in *Burton, et al v. Coss, et al, 280 Pac. 1093, 139 Okla. 42,* the Court there saying:

> "The question of abandonment is to be determined by the facts and circumstances surrounding each particular case. The intent to abandon by the lessee is to be determined by his attitude toward the enterprise as a whole. He might intend to hold the land itself without any intention or proceeding to test the premises and develop the same for oil and gas. *If he abandons the purpose of the lease, he will be held to have abandoned the land which was granted as an incident to the enterprise.* Mills on Oil and Gas, 166)." (Emphasis supplied).

If the Fidelity Operating Agreements did not expire by their own terms, then any rights appelles had under the agreements were abandoned, and the determination by the Trial Court that there was no abandonment is clearly erroneous.

## VIII

## APPELLEES ARE ESTOPPED FROM CLAIMING THE FIDELITY OPERATING AGREEMENTS WERE STILL IN EFFECT.

The Court erred in not holding that appelles were estopped from claiming the Fidelity Agreements were subsisting agreements as to the appellants. (Specification of Error No. 16).

By the reply, appellants pleaded that appellees were estopped from claiming any right in the lands described in the complaint. (Tr. 104, 105). The facts wil not be restated in this section of the brief, nor will there be long discussion of the general principles applicable to estoppel. The acts of the appellees upon which the claim of an estoppel is founded by appellants are that from the making of the Fidelity Operating Agreements through 1937, appellee Fidelity Gas Company engaged in a very active, extensive drilling program with frequent reports to appellants. In 1937 and 1938, through statements of Cecil Smith and Heskett, appellants were given to understand that appellee Fidelity Gas had given up any claim to any rights under the Fidelity Operating Agreements. All drilling was terminated. From 1938 to 1951, appellees gave no indication that they were claiming any rights under the Fidelity Operating Agreements. Relying on the conduct and the silence of appellees, appellants took no affirmative steps to quiet the title to these lands.

All of the essential elements of estoppel are present as those elements are specified in *Waddell v. School District No. 2, 74 Mont. 91, 96, 238 Pac. 884, supra,* the requisite elements being that:

"1. The party to be estoppel must be possessed of knowledge of the true facts or conditions;

2. He must intend that his statements or conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe that he so intended;

3. The party on the other side must be ignorant as to the true state of facts; and

4. Must rely upon the representation made or conduct of the party to be estopped."

To paraphrase this quoted language, 1, appellees knew of the statements of Smith and Heskett and of the cessation of drilling; 2, Fidelity intended that the statements of Smith and Heskett and the silence from 1930 on, should be acted upon by appellants, or at the very least, that the actions of appellee were such that appellants had a right to believe that appellee intended that appellants should act upon a belief that appellee intended that the Operating Agreement be terminated; 3, appellants were ignorant of the fact that appellees were claiming the Fidelity Operating Agreements were still effective, and, 4, appellants clearly relied upon the representation made and the silence of appelle, and for that reason, failed to take affirmative steps years ago to quiet their titles to the lands involved.

The contrast between the situations of Fidelity and appellants as to the lapse of time is striking. The Trial Court found non-action for a period of 21 months to be sufficient to estop appellants. In the case of appellees, there was not only silence and non-action from early 1938 to April, 1952, but there were the statements of Cecil Smith and Heskett which, at the very least, were statements of an intention not to do any more drilling under the agreement, followed by the total lack of any activities on seismographing, exploration or drilling within 35 miles of the lands of the appellants for some 18 years.

We respectfully submit that the record requires a finding of estoppel as against the appellees and that the Court's failure to make such a finding was clearly erroneous.

## CONCLUSION

Appellants respectfuly submit: (1) They are not estopped to question the validity of the Fidelity Operating Agreements as they apply to appellants' lands; (2) The appellants have not waived the right to urge that the Fidelity Operating Agreements have terminated; (3) The appellants are not guilty of laches in asserting their claims; (4) Appellees failed to exercise the option by drilling further wells in accordance with the terms of the Fidelity Operating Agreements, and as a result, the agreements terminated ipso facto; (5) If the Fidelity Operating Agreements did not terminate ipso facto by failure of appellees to exercise the option, they terminated by breach of the implied

covenant to diligently drill and develop; (6) If the Fidelity Operating Agreements did not terminate otherwise, they terminated by abandonment; (7) The appellees are estopped from claiming the Fidelity Operating Agreements were still in effect.

The judgment of the Trial Court should be reversed with directions to enter a judgment for the appellants quieting the titles to their lands and leases insofar as they relate to the deeper sands.

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